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NEW JERSEY EQUITY REPORTS.

VOLUME XVI.

C. E. GREEN 1.

I

REPORTS OF CASES *a/*

ARGUED AND DETERMINED IN

**THE COURT OF CHANCERY,
THE PREROGATIVE COURT,**

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS,

OF THE */6*

STATE OF NEW JERSEY.

CHARLES EWING GREEN, Reporter.

**TRENTON:
HOUGH & GILLESPIY, PRINTERS, CHANCERY BUILDING.**

1867.

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Chancellor
DURING THE PERIOD OF THESE REPORTS,
HON. HENRY W. GREEN.

Judges of the Court of Errors and Appeals.

EX OFFICIO JUDGES.

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“ E. B. DAYTON OGDEN,
“ LUCIUS Q. C. ELMER,
“ DANIEL HAINES,
“ PETER VREDENBURGH,
“ JOHN VAN DYKE,
“ GEORGE H. BROWN, } *Associate Justices
Supreme Court.*

Judges Specially Appointed.

HON. JOHN M. CORNELISON.
“ WILLIAM N. WOOD.
“ JOSEPH COMBS.
“ ROBERT S. KENNEDY.
“ GEORGE F. FORT.
“ JOSHUA SWAIN, to March 19, 1863.
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ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1863.

HENRY W. GREEN, Esq., CHANCELLOR.

RUFUS STORY *vs.* THE JERSEY CITY AND BERGEN POINT
PLANK ROAD COMPANY, and others.

1. The Court of Chancery has no power, by injunction, to restrain any citizen from petitioning either branch of the legislature upon any subject of legislation in which he is interested. Such restraint would be an unauthorized abridgment of the political rights of the party enjoined.

2. The proper office of Courts of Justice is to adjudicate upon, and to protect and enforce the legal and equitable rights of parties litigant, as they are established by existing laws. It is no part of their appropriate function to determine in advance, whether a proposed law may or may not be enacted consistently with the rights of parties, or to interfere directly or indirectly with the course of legislation.

3. Where, at the time of the grant of a charter to a corporation, there is a general law of the state, that the charter of every corporation granted by the legislature shall be subject to alteration, suspension or repeal, in the discretion of the legislature, the legislature, in granting such charter, must be deemed to have reserved to themselves the right of altering, suspending or repealing the same, whenever, in their discretion, the public good may require it, as fully as if the reservation were inserted in the charter. And all contracts, express or implied, resulting from the act of incorporation

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and its acceptance by the stockholders, must be deemed to have been entered into by both parties, subject to that reservation.

4. Whatever limitation may exist to the reserved right of the legislature to alter or repeal a contract, such reservation is in itself valid, and this court ought not, upon a motion for a preliminary injunction, to pronounce any alteration, suspension or repeal of the charter, to be unconstitutional or illegal. Much less should this court make such declaration in advance of any actual legislation.

Under the provisions of the charter of incorporation of the Jersey City and Bergen Point Plank Road Company, *Pamph. Laws*, 1850, p. 255, and the supplements thereto, *Laws*, 1851, p. 288, and 1860, p. 392, and of the charter of incorporation of the Jersey City and Bergen Railroad Company, *Laws*, 1859, p. 411, and the supplement thereto, *Laws*, 1860, p. 393—

Held, that the occupation of a part of the ancient highway on which the plank road is constructed, by the railway, with the consent of the plank road company, without the personal consent of a stockholder, the plank road company having been authorized by the legislature to lay rails upon their road, is no violation of the rights of such stockholder.

Held also, that the sale by the plank road company of the whole or a part of their road to the railroad company, without the personal consent of a stockholder, is not such an infringement (if any) of his rights as this court will interfere to restrain by injunction.

Held further, that a change of the route of the plank road by authority of the legislature, at the instance of the plank road company, is not a fundamental change of the objects of the company, or a fundamental alteration of the structure thereof, which equity will restrain at the instance of a stockholder.

The bill in this cause was filed by Rufus Story, a stockholder in the Jersey City and Bergen Point Plank Road Company, for an injunction to restrain the commission of acts by the company, charged to be prejudicial to the interest of the complainant as a stockholder in said company. The company was incorporated on the 8th of March, 1840, and was authorized to construct a plank road of a specified description, from Grand street, in Jersey City, upon the main road or highway, to Bergen Point. The charter was accepted, the stock subscribed (the complainant becoming a stockholder), the company organized, and the road constructed pursuant to the requirements of the charter and of a supplement thereto, approved on the 14th of March, 1851. The highway over which the plank road was thus constructed, for the

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distance of about two miles from the Kill Van Kull to a turn in the road to the west, a few hundred feet north of where the Reformed Dutch Church of Bergen Neck now stands, is part of an ancient highway, laid out and opened three rods wide, in the year 1786.

The Jersey City and Bergen Railroad Company were incorporated by an act approved on the 15th of March, 1859, with power to construct a railroad from some point on the Kill Van Kull, at or near Bergen Point, to the Newark turnpike road, with one or more branches to the ferries in Hudson county, south of Hoboken. They were authorized to purchase any plank road or roads within the limits defined by their charter. They were prohibited by their charter from using any other than horse power in running their cars, and from constructing their road within fifty feet of any plank road, without the consent of such plank road company, except to cross the same.

By a supplement to the charter of the plank road company, approved on the 17th of March, 1860, they were authorized to lay iron rails and run cars upon their road, with the proviso, among others, that said rails should be so laid as not to hinder or obstruct the public travel on said road, and also to straighten or widen their road or any part thereof, at their pleasure, on first obtaining the written consent of the owners of the land taken for such straightening and widening. The complainant never personally assented to the last mentioned act, or to the act incorporating the railroad company.

By virtue of the last mentioned act, the promoters of the railway, who had a majority of the stock of the plank road company, and the said plank road company claim to have a right to lay said railway or to allow the railroad company so to do, upon that part of the plank road extending about two miles northward from the Kill Van Kull, and have entered into negotiations and made arrangements for that purpose, and have advertised that application will be made to the legislature, at its next session, for power to alter the route of the plank road and to straighten the same. The pro-

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motors of the railway also threaten and intend that the plank road company shall give its consent to the occupation of their road for a railway, or make sale of the plank road or some part thereof for that purpose.

The bill charges that, if the intentions of the two companies and of the persons owning the majority of the stock of the plank road company, but interested in the said railway, are carried out, the object for which the plank road company was created, will, without the complainant's consent, be abandoned, the route of the road altered, and a new route established. That the complainant's funds and the funds of said corporation will not be devoted to the objects of said corporation, but to other and different purposes; the objects and structure of the company will be fundamentally altered; the franchises of the company disposed of and impaired; and thus the contracts between the complainant and the plank road company and the stockholders thereof, and the trusts with which said plank road company is charged, would be violated. That if the legislature shall pass such act as is advertised and intended to be applied for, without the complainant's consent, it would impair the franchise granted to the plank road company and to the complainant as co-stockholder thereof, and would authorize an abandonment of a part of the route of the road. That the capital stock and franchises of the company will, by the state, be diverted from the objects of said incorporation, and the objects and structure of the company fundamentally altered, and thereby the obligation of the contract between the complainant and the state, as well as of the contracts between the complainant and the company and the other stockholders thereof, be impaired. That the conditions upon which the grant of power to lay the railway upon the plank road was made cannot be complied with, inasmuch as the construction and use of said railway upon the plank road, will necessarily hinder and obstruct the travel thereon.

The prayer of the bill is—

1. That the plank road company may be perpetually re-

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strained from consenting to the occupation, by the railway, of any part of the plank road; and the railroad company from accepting such consent, without the consent of the complainant and the other stockholders of the plank road company, on whose behalf the bill is filed.

2. That the plank road company may be perpetually enjoined from selling any part of their road to the railroad company; and the railroad company from making such purchase, without the like consent.

3. That the plank road company may be perpetually enjoined from making any application to the legislature for authority to abandon any part of said plank road, or to change fundamentally the objects of said company, or to alter fundamentally the structure of said road, without the like consent; and the railroad company, its officers, stockholders and promoters, from aiding and abetting such application.

4. That the railroad company may be perpetually enjoined from building a railway on said part of said plank road, and from making any excavation therein, or doing any act there for that purpose.

The cause was heard on application for an injunction pursuant to the prayer of the bill, upon the bill, answer and affidavits.

Gilchrist, for complainant.

Zabriskie, for defendants.

THE CHANCELLOR. Most of the points discussed by counsel upon the hearing, and upon which the decision of the present application in any degree rests, are free from serious doubt or difficulty. At the present stage of the cause they will be disposed of without further discussion, by stating briefly the grounds of the decision.

I am of opinion—

1. That the occupation of a part of the ancient highway on which the plank road is constructed, by the railway, with the consent of the plank road company, without the personal

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consent of the complainant, the plank road company having been authorized by the legislature to lay rails upon their road, is no violation of the rights of the complainant, as a stockholder of said company.

2. That the sale by the plank road company of the whole or a part of their road to the railroad company, without the personal consent of the complainant, is not such an infringement (if any) of the complainant's rights as a stockholder, as this court will interfere to restrain by injunction.

3. That a change of the route of the plank road by authority of the legislature, at the instance of the plank road company, is not a fundamental change of the objects of the company, nor a fundamental alteration of the structure thereof, which equity will restrain at the instance of a stockholder.

This disposes of the motion, so far as an injunction is asked to protect the property of the complainant or his rights, from any violation by the acts of the defendants under existing laws.

But the court is further asked, that the plank road company may be perpetually restrained from making any application to the legislature for authority to abandon any part of their plank road, or to alter fundamentally the structure of the said company; and that the said company, its officers and promoters, may be perpetually enjoined from aiding and abetting such application.

This, it is believed, is the first instance in this country, of an application to a court of equity to restrain, by writ of injunction, an application to the legislature for any purpose, either of public or private concern. It is admitted that there is no American precedent for the exercise of such power. This fact in itself, though not decisive, is a persuasive argument against the propriety of its exercise. In England, though applications to parliament have been restrained by injunction, the practice is of very recent origin, and there are but few reported cases of its exercise. It was adopted by Vice Chancellor Shadwell, in 1831, in *Cunliff v. The Manchester and Bolton Canal Company*, and in *Ware v. The*

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Grand Junction Water Works Company, 2 Russ. & M. 470, and note. The former case was compromised without appeal ; the latter was reversed on appeal by the Lord Chancellor.

In *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and The Clarence Railway Companies, 2 Phillips 666, (1848)*, an injunction was granted by Vice Chancellor Shadwell to restrain a railroad company from opposing a bill brought before parliament by another railroad company, for the amalgamation of the two companies. On appeal the injunction was dissolved upon the merits, though the jurisdiction of the court was maintained by Lord Cottenham.

In *Heathcote v. The North Staffordshire Railway Company, 2 Macnaghten and Gor. 100, (1850)*, an injunction was granted by the Vice Chancellor, restraining the defendants from making application to parliament for any act to authorize them to abandon certain branch railways, or to authorize anything to be done or omitted by the company, inconsistent with, or repugnant to, a covenant entered into by them with the complainant. This injunction was also dissolved by Lord Cottenham upon the merits. In no one of these cases was the injunction restraining a party from making application to parliament, either in support of or in opposition to a bill, finally sustained.

There are a number of cases in which the court have enjoined a corporation having funds for distinct objects, from using them to promote an application to parliament for a fundamental change in their charter. But this, it is obvious, is an exercise of power resting on very different principles. It is simply a restraint upon the corporation of a diversion of its funds from the purposes for which they are held in trust to other and different purposes. *The Attorney General v. The Corp. of Norwich, 16 Simons 225; Munt v. The Shrewsbury and Chester Railway Co., 13 Beav. 1; Stevens v. The South Devon Railway Co., Ibid 48; The Great West. Railway Co. v. Rushout, 5 De Gex and Small, 290, (10 Eng. Law and Eq. 72); Simpson v. Denison, 10 Hare 51, (16 Jur. 828).*

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The rule seems to be well settled in England, that a court of equity will not, either at the instance of a stockholder or of a third party, restrain a corporation from applying to parliament for an alteration of its charter.

As has been already intimated, the *jurisdiction* of the Court of Chancery to restrain a party from petitioning parliament for or against a measure, has been repeatedly affirmed by the English Chancellors. Thus, in *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and The Clarence Railway Companies*, Lord Cottenham said: "There is no question whatever about the jurisdiction; a party who comes to oppose a railway bill in parliament, does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to parliament. This court, therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in parliament as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims." And in the earlier case of *Ware v. The Grand Junction Water Works Company*, Lord Chancellor Brougham said: "It is quite idle to represent this as an attempt to restrain by injunction the proceedings of parliament."

It will be freely admitted that the injunction operates directly, not upon the legislature but upon the party enjoined, and in no wise interferes with the exercise by the legislature of its rightful powers. But I cannot resist the conviction that such exercise of power, under our form of government, is an infringement of the rights of the people and of their representatives. If not a direct infraction of the bill of rights and of the letter of the constitution, it is in conflict with the spirit of republican government and the structure of its institutions. Every citizen has an unquestioned right to petition either branch of the legislature upon any subject of legislation in which he is interested. Every legislator has a

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right to be informed of the views and wishes of all parties interested in the enactment of a law. This right to perfect freedom of intercourse between the representative and his constituents is not founded upon any constitutional provision or bill of rights, but springs from the very structure of the government. By what authority shall this court step between the representative and his constituents, and deny to the one or the other the exercise of his political rights in their fullest freedom? It is conceded that the legislative powers cannot be trammeled by injunction. The legislature can neither be restrained from legislating upon any subject, nor from exercising their authority to obtain information upon any matter of legislation. And if the legislature cannot be restrained from asking the information, can the citizen be restrained from giving it? Are the rights of the representative more sacred than those of his constituents? It appears to me that the granting of such injunction is an unauthorized abridgment of the political rights of the party enjoined. The proper office of courts of justice is to maintain and enforce the legal and equitable rights of parties litigant, as established by existing law. It is no part of their office to determine in advance what laws ought or ought not to be enacted, or to interfere, directly or indirectly, with the course of legislation.

The complainant's bill is framed upon the theory that the charter of an incorporated company cannot be altered in any essential particular, even with the consent of the corporation, without the consent, express or implied, of every stockholder; and that such alteration would be unconstitutional, as impairing the obligation of the contract entered into between the state and such stockholder. If this doctrine should be admitted in its fullest extent, it is not perceived that it can affect the result of the present application.

When the charter of the Jersey City and Bergen Point Plank Road Company, of which the complainant claims to be a stockholder, was granted, it was provided by a general law of the state that the charter of every corporation granted by the legislature should be subject to alteration, suspension

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and repeal, in the discretion of the legislature. The legislature, therefore, in granting the charter to the plank road company, must be deemed to have reserved to themselves the right of altering, suspending, or repealing the charter, whenever, in their discretion, the public good might require it, as fully as if the reservation were inserted in the charter. And all the contracts, express or implied, resulting from the act of incorporation and its acceptance by the stockholders, must be deemed to have been entered into by both parties, subject to that reservation. Whatever limitation may exist to the reserved right of the legislature to alter or repeal the contract, I am clear that the reservation is in itself valid, and that this court ought not, upon a motion for a preliminary injunction, to pronounce any alteration, suspension, or repeal of the charter to be unconstitutional or illegal. Much less should this court make such declaration in advance of any actual legislation.

The plank road company were incorporated with power to construct a plank road upon an ancient public highway and with the franchise of taking tolls thereon. No limit is fixed for the duration of the charter. The legislature have since incorporated a company to construct a horse railroad between the same *termini*. They have authorized the railroad company to purchase the plank road. They have also authorized the plank road company to lay rails upon their track. They have, however, provided that if the plank road is purchased by the railroad company, the plank road shall be continued; and if the rails are laid thereon by the plank road company, they shall be so laid as not to hinder or obstruct public travel. It must be presumed that the public convenience demanded the increased facility to be afforded by the construction of the railroad. Of that the legislature were the peculiar exclusive judges.

The complainant, a stockholder in the plank road company, now asks that the company shall be restrained from making any application to the legislature to abandon or change any part of their route, for this, it is insisted, would be fundamen-

Burlew v. Hillman.

tally changing the objects of the company without his consent; and that the railroad company, its officers, stockholders and promoters, shall be enjoined from aiding and abetting such application. If this claim have any foundation in law or in equity, which is by no means admitted, and if it be recognized, it would place it in the power of a single stockholder, for his own pecuniary interest, against the wish of every other stockholder and the convenience of the whole community interested in the line of travel, to prevent even a petition for a change.

The injunction is denied without costs.

•PHEBE ANN BURLEW vs. JOHN F. HILLMAN, and others.

1. It is no defence to a suit brought by a wife after the death of her husband, to foreclose a mortgage made to her *jointly* with her husband for the benefit of the wife, that the bond was given to the husband *alone*, and to his heirs. She is the surviving mortgagée, and has a clear right to enforce her remedy under the mortgage.

2. A party *beneficially* interested in a contract may maintain a suit in equity in his own name to enforce such rights, though he be not a party to the instrument creating them.

3. Where there are several parties in interest, and the mortgagor is in doubt as to the rights of the complainant under a bill to foreclose, he is entitled to have the question judicially determined for his own security, but not at the cost of the mortgagée.

4. The general rule is that the mortgagée is entitled to costs, both on bills to redeem and to foreclose.

Bedle, for complainant.

Schenck, for defendant.

THE CHANCELLOR. The bill is filed to foreclose a mortgage, given by John F. Hillman and wife to Phebe Ann Burlew and Richard Burlew, to secure the payment of the

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sum of one thousand dollars, with interest, agreeably to the condition of an obligation of even date, given by Hillman to Richard Burlew, his heirs and assigns. The condition of the bond is, that the obligor shall pay to the said Phebe Ann Burlew, during her natural life, annually, on the first day of April, the interest of one thousand dollars, and such further sum of the principal, not exceeding twenty-five dollars, as may be necessary for her support and maintenance; and if the said Richard shall survive the said Phebe Ann, the obligor shall pay him the interest during his natural life, and on the decease of the said Richard and Phebe Ann, shall pay the principal sum of one thousand dollars, or so much thereof as remains unpaid, to the heirs of the said Richard and Phebe Ann Burlew. If there be a default in the payment of interest, and the same remain unpaid for six months after becoming due, the whole sum to become due and payable on demand, and the said sum reinvested as above specified, by consent of the parties interested.

The bill prays that the complainant may receive the arrears of interest, with twenty-five dollars per annum for her support and maintenance, and that the balance of principal remaining unpaid may be decreed to be paid and reinvested for the purposes of the trust.

The mortgagees, Richard Burlew and Phebe Ann Burlew, were husband and wife. Articles of separation were entered into between them, contemporaneously with the date of the bond and mortgage, which were given, as appears by the recital of the mortgage, for the purpose of carrying the provisions of the articles into effect. The husband died in November, 1860. The parties continued to live separate during the life of the husband; the wife receiving, for several years, the interest and twenty-five dollars of the principal, annually. Both principal and interest were in arrear at the time of filing the bill, on the twelfth of June, 1861.

The question, how far a court of equity will interfere to enforce the provisions of a voluntary separation between husband and wife, is not raised, nor is the validity of the

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deed of separation drawn in question. The parties, it is admitted, lived separately from the date of the bond and mortgage, until the death of the husband; the wife receiving the sum of principal and interest stipulated to be paid by the husband, in lieu of her support and maintenance and in full discharge thereof. Enforcing compliance with the terms and conditions of the bond against the obligor at this time can affect no marital right or obligation, as between the husband and wife. As against the defendant, the equitable right of the wife is clear.

It is objected that the suit cannot be maintained in the name of the wife, inasmuch as the bond was given to the husband alone and to his heirs. This objection would be fatal to an action at law brought by the wife upon the bond. For the right of action at law is vested solely in the party having the strict legal title and interest, in exclusion of the equitable claim. 1 *Chitty's Pl.* (ed. 1837) 2.

But the complainant is seeking to enforce not a legal, but an equitable right. She has the entire beneficial interest in the bond, so far as the objects of this suit are involved. She is moreover the surviving mortgagee; the mortgage having been executed to her jointly with her husband, and she has therefore a clear right to enforce her remedy under the mortgage. Independently of this circumstance, a party beneficially interested in a contract may maintain a suit in equity in his own name to enforce such rights.

Equity recognizes the right of a wife to a separate estate, and will protect and enforce that right, even as against the husband, without the interposition of trustees. If the husband is living, and the legal right vested in him, equity will treat him as a *trustee* for the wife. The trust in favor of the wife will attach upon him, and be enforced as if he were a mere stranger. 2 *Story's Eq. Jur.*, § 1378, 1380.

But the husband being dead, the wife being the surviving mortgagee, and the beneficial interest exclusively in her, the case is clear of all difficulty upon this point.

The material question in the cause is, whether the com-

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plainant is entitled to recover more than the arrears of interest due upon the mortgage.

It is insisted first, that no part of the principal is necessary for her support and maintenance, in which event only, by the terms of the contract, it is to be paid to her. By the terms of the contract the complainant is to receive, in addition to the interest, so much of the principal, not exceeding twenty-five dollars in any one year, as may be necessary for her support and maintenance. It is urged that as the complainant is furnished a home by her son and is not incapable of labor, no part of the principal is necessary for her support.

It is difficult to determine what was understood and intended by the phrase, "necessary for her support and maintenance." It would seem, that it must have been intended by the parties that the wife should contribute to her support by her own labor, for the whole provision is not sufficient to furnish her the bare necessaries of life. The lowest rate at which she could procure board in the vicinity where she lives, is shown to be two dollars per week, and the cost of clothing suitable to her station in life, is shown to be fifty dollars per annum. Nor on the other hand could it have been intended merely to keep the wife from absolute want. It must have been designed to furnish the wife a comfortable subsistence, in connection with the earnings of such labor of her own as might be suitable to her age and state of health. In this view of the case, the evidence shows that she is entitled to receive the full extent of the allowance provided by the contract. This conclusion is fully justified by the fact that twenty-five dollars of the principal was paid to the wife by the defendant while the husband was alive, for three years after the execution of the contract. The defendant is a son-in-law of Burlew, was on terms of familiar intercourse with him after the separation, lived in the vicinity of the parties, and must have known the views of the husband and the wants of the wife. No change in the situation or circumstances of the wife is shown, rendering the provision less necessary for her support now, than it was immediately after

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the contract was made. The conduct of the parties has gone far to settle the true interpretation of the contract.

The fact that a son of the complainant temporarily contributes to her support by furnishing her a home, cannot affect her legal rights under the contract.

It is further urged that the complainant agreed to accept interest on the whole principal of the bond, sixty dollars per annum, in full of her claim, acknowledging that the twenty-five dollars of principal was not necessary for her support. This agreement is not satisfactorily proved. No consideration is pretended to have been paid for it. The complainant and her son, while they admit that this arrangement was proposed, both deny that any contract to that effect was consummated. The complainant is entitled to recover the arrears of interest, with the annual instalments of principal remaining unpaid.

There is a clear forfeiture of the bond. No one of the instalments of interest, except the first, has been paid within six months after becoming due. By the terms of the contract the whole principal of the bond has become due, and the complainant is entitled to have the same collected and re-invested under the direction of the court, or by consent of the parties interested.

There is no necessity of a reference to a master. The amount due is a mere matter of computation. If the parties cannot agree as to the amount, the computation may be at once made and the amount ascertained by a master.

It is obviously for the interest of all parties that the investment should not be unnecessarily changed; and if changed, that it should be by consent of those interested, and if practicable, without the aid and direction of the court.

The complainant is entitled to costs. If the mortgagor was in doubt as to the rights of the complainant, he was entitled to have the question judicially determined for his own security, but not at the cost of the mortgagee. Nor will the refusal of the heirs of the husband to sign a written assent

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to the payment of the principal, affect the question. The rights of the mortgagee cannot be prejudiced by such refusal. The general rule is that the mortgagee is entitled to costs, both on bills to redeem and to foreclose. See cases collected in note to *Cranstown v. Johnston*, 1 *Hovenden's Sup. to Vesey Jr.* 267.

There is nothing in the case to exempt the defendant from the operation of the general rule.

PHEBE FREEMAN *vs.* JAMES J. SCOFIELD and others.

1. Where a mortgage is given or assigned for the payment of a debt due to two or more jointly, on a bill to foreclose filed by the surviving obligee, the executor of a deceased co-obligee need not necessarily be joined as a complainant.
 2. When there are conflicting claims between the parties in interest in the mortgage debt, the surviving obligee may file the bill in his own name, and make the executor of the deceased co-obligee a defendant.
 3. Whether the executor of a deceased co-obligee should be joined with the surviving obligee as complainant, or be made a party defendant to the suit, is a question of *form*, and should be raised upon *demurrer*.
 4. Objections to pleadings which involve no substantial interest, are not allowed upon the final hearing.
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T. Little, for complainant.

Chandler, for defendants.

THE CHANCELLOR. The bill is filed to foreclose a mortgage given by the defendant to Ira C. Whitehead, executor, and by him assigned to Phebe Freeman and Mary Ann Freeman. Mary Ann Freeman died testate before the filing of the bill. Phebe Freeman, the surviving assignee, filed the bill in her own name, claiming to be entitled to one half of the mortgage debt in her own right, and to the balance as trustee for the estate of the deceased assignee. The defend-

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ant, by his answer, admits all the material charges of the bill, but insists that the executor of the deceased assignee should have been joined in the bill as a complainant. The executor is made a defendant and a decree *pro confesso* is taken against him.

The assignment, as stated in the bill, purports to have been made to the assignees jointly. They had a joint interest in the mortgage debt, and occupy the same position as to their rights that they would have done had the bond and mortgage been made to them jointly.

The rule is well settled that when one of two or more obligees or others, having a joint legal interest in the contract, dies, the action at law must be brought in the name of the survivor, and the executor of the deceased obligee must not be joined. Nor can he sue separately, for the entire legal interest survives. The executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered. 1 *Chitty's Pl.* (ed. 1837) 21; *Broom on Parties*, 8 C; *Anderson v. Martindale*, 1 East 497.

The survivor is entitled to the possession of the joint securities, and her receipt will be a valid discharge for the debt. Nor will a court of equity, where there are several joint securities in the hands of the survivor, appoint a receiver to collect and divide the joint fund in the proportions to which the parties are entitled, nor compel an apportionment of the securities between them. *Penn v. Butler*, 4 Dall. 354; *Wallace v. Fitzsimmons*, 1 Dall. 250.

And the principle applies whether the beneficial interest of the joint obligees in the fund be equal or unequal, and even though the entire beneficial interest was in the deceased obligee.

The legitimate inference from the statements of the bill, which are not denied, is, that the right of possession and legal ownership of the securities is in the complainant, and that the beneficial interest in one half of the fund is also in her. She holds one moiety of the fund in her own right,

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and the other moiety as trustee for the estate of the deceased co-obligee.

It is one entire debt, and must be recovered either at law or in equity by one suit, and not in separate portions. In cases of joint claims or obligations, all persons having a community of interest in the claims or liabilities and who may be affected by the decree, are to be made parties. *Story's Eq. Pl.*, § 159, § 169.

So also both the trustees and *cestui que trust*, as a general rule, are necessary parties. *Story's Eq. Pl.*, § 193, § 207.

The object of the rule is to have all the parties in interest before the court, that the decree may be final and conclusive upon them, and afford adequate protection to the party required to perform the decree.

Ordinarily all parties interested in obtaining a decree are joined as complainants, but not necessarily so. The *cestui que trust* may refuse to join, or have some interest adverse to the claim of the complainant. In the present case the executor might have alleged that the testator was beneficially interested in the securities to a larger amount than is admitted by the complainant. Under these or similar circumstances, the surviving obligee must file the bill in her own name, making the executor of the deceased co-obligee a defendant. If any such reason were suggested by the bill, the bill would be free from exception.

It would perhaps have been more in accordance with the practice of the court, had the survivor and the executor of the deceased obligee united as complainants in the suit. But it is a mere question of practice, and the course adopted affects, prejudicially, no substantial interest. The necessary parties are all before the court. A valid decree may be made which will effectually protect the defendant and be final and conclusive upon all parties interested.

If there be anything whatever in the objection, it is purely a question of form, and should have been raised upon a demurrer. Objections to pleadings which involve no substantial interest, are not allowed upon a final hearing.

The complainant is entitled to a decree.

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GEORGE R. JOHNSON and WILLIAM M. BODINE *vs.* CHARLES S. GARRETT and others.

1. A sale by auditors in attachment of several tracts of land, that might conveniently and reasonably have been sold separately, and where a sale of part would have been sufficient to satisfy the debts of the plaintiff and the applying creditors, is a clear breach of trust, and will be set aside as void.
 2. A *bona fide* purchaser of land, subject to the lien of an attachment, is entitled to relief against an illegal or inequitable sale by the auditors.
 3. Where a judicial sale is set aside on the ground of gross negligence or abuse of trust, the officer making such sale, as well as the purchaser acting in collusion with him, will be condemned in costs. But where there is no charge of actual fraud or collusion, neither the officer nor purchaser will be condemned in costs.
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On final hearing.

Hugg, for complainant ex parte.

THE CHANCELLOR. The bill is filed to set aside a sale of real estate made by auditors in attachment. The writ under which the land was seized and sold, was issued at the suit of Charles S. Garrett against Joseph O. Johnson, under whom the complainants subsequently acquired title. The land consists of four lots on Market street, in the city of Camden, each twenty feet front by one hundred and eight feet deep, making one plot of eighty by one hundred and eight feet. Each lot was worth \$1000. They could conveniently and reasonably have been sold separately. The whole amount of the judgment for which they were sold was less than three hundred dollars. The four lots were offered in one entire parcel, and were struck off to Garrett, the plaintiff in attachment, for \$1015, more than double the amount of the judgment. Even at this price, two of the lots would have brought more than sufficient to pay the judgment. There is no reasonable room for doubt that any one of the lots might have

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been sold for more than enough to satisfy all the claims under the attachment.

The sale, as made, was clearly a breach of trust and a violation of duty on the part of the auditors. They were authorized by the statute to sell only so much of the land as was necessary to satisfy the debts of the plaintiff and of the applying creditors, in whose favor judgment was rendered. *Nix. Dig.* 41, § 35.

In *Stead's Executors v. Course*, 4 *Cranch* 403, the sale was made by a collector of taxes under a statute of the state of Georgia, conferring powers of sale upon the collector, substantially the same in respect to the real estate as those conferred upon the auditors under the attachment act of this state. It authorized the collector, in case of a default in the payment of taxes, to proceed against the defaulter by distress and sale of his goods and chattels, if any be found, otherwise on the land of such defaulter or so much thereof as will pay the amount of taxes, with costs. Chief Justice Marshall, in delivering the opinion of the court setting aside the sale, said: "If a whole tract of land was sold, when a small part of it would have been sufficient for the taxes, the collector unquestionably exceeded his authority."

In *Tiernan v. Wilson*, 6 *Johns. Ch. R.* 414, Chancellor Kent said: "The proposition is not to be disputed, that a sheriff ought not to sell at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently and reasonably detached from the residue of the property and sold separately. The justice of this rule is self-evident." And after citing with approbation the case of *Stead's Executors v. Course*, already referred to, and advertising to the fact that the sale in that case was made under the express provisions of a statute, the chancellor adds: "The rule must be the same without any positive law for the purpose. It rests on principles of obvious policy and universal justice."

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The same principle is sanctioned in *Woods v. Monell*, 1 *Johns. Ch. R.* 506, and in the cases there cited.

Doubtless a discretion is vested by law in the officer charged with the sale of real estate, either by authority of a statute or under the direction of a judicial tribunal, touching the quantity of land necessary to be sold, and whether the sale shall be in bulk or in parcels. And where this discretion has been exercised by the officer, courts are reluctant to interfere with his action, except in a clear case of excess of authority, or prejudice to the rights of the parties interested. The objection lies not against the exercise, but the abuse of the discretion.

The complainants appear to me to stand upon high ground and to have strong claims to equitable relief. They are the real owners of the land. They purchased and paid for it in good faith, believing it to be unencumbered, and having no knowledge or suspicion of the existence of the attachment. The defendant in attachment had no interest in the land, and, so far as appears, no substantial motive to protect the interests of his alienees. The complainants are stripped of their title by virtue of legal proceedings against a third party, without any wilful default or neglect upon their part. They had no knowledge of the existence of the claim against the property, and consequently no opportunity of satisfying it. They had no notice of the proceedings to effect a sale, and no opportunity of protecting their rights. In cases of ordinary sales under judicial process, some one is usually present, either on behalf of the plaintiff or the defendant, interested in seeing that the property is sold fairly and for something like its market price. But under sales by auditors in attachment, where the claim is small and the property levied upon is valuable, there is no such protection. The sale is often made, as was the fact in the case now under consideration, where no one is present or has an opportunity of being present, who is interested in enhancing the value of the property or protecting the rights of the real owners. Under such circumstances it is peculiarly important that all excess of authority and all

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abuse of discretion on the part of the auditors should be sedulously guarded against.

There is no defence to the charges of the bill. No answer has been filed, either by the auditors or by the purchaser. The bill is taken as confessed. All the material facts are clearly established in evidence. I entertain no doubt as to the right or the duty of the court to interfere for the protection of the complainants.

In *Tiernan v. Wilson*, 6 Johns. Ch. R. 411, where a sale was made under circumstances not dissimilar in several of its features from the sale now in question, the court set aside the sale and ordered the purchaser who had received his deed, to deliver it up to be cancelled, although he was a stranger to the proceeding, and as against him there was no charge of fraud. The sheriff also, on the ground of gross negligence and abuse of trust on his part, was condemned in the costs occasioned by his defending the suit, although there was no charge of actual corruption against him.

There is no charge in the bill, or intimation in the evidence, of any collusion between the auditors and the plaintiff in attachment who became the purchaser at the sale; and although the conduct of the purchaser since the sale, in refusing, upon a tender of full satisfaction, to release a claim most inequitable as against the complainants, appears to have been unreasonable and oppressive, I find no ground upon which either of the defendants can be condemned in costs.

I shall accordingly decree that the sale be set aside as void, but without costs, with liberty to the complainants, in case the plaintiff or other creditors in attachment, upon being paid or tendered the amount due, refuse to acknowledge satisfaction of their claims, to apply to this court for a perpetual injunction or such other relief as they may be advised.

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JOHN KEENEY *vs.* GEORGE ATWOOD and others.

By the act of 1854, *N.J. Dig.* 851, § 64, when the mortgagee resides in a different township from that in which the mortgaged premises lie, the tax on the money secured by the mortgage is to be assessed against and paid by the mortgagor in the township where the lands lie, and the receipt of the collector therefor is made a legal payment for so much of the interest of the mortgage, and is to be allowed and deducted therefrom by the mortgagee. *Held*—

1. The payment of the tax and the receipt of the collector is a legal payment of so much *interest*, not of principal; a payment of the *accrued* and *accruing* interest, not of interest to grow due at some future time.
 2. When a mortgagor, entitled to have the tax assessed against and paid by him deducted from the interest, has paid the interest in full as it became due, without deducting the tax, he cannot afterwards claim any deduction therefor from the arrears of interest.
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J. W. Taylor, for complainant.

H. S. Little, for Atwood and wife.

THE CHANCELLOR. The complainant's bill is filed to foreclose a mortgage, given to secure the payment of a bond for \$750, bearing date on the tenth of April, 1852, with interest.

The defendants by their answer claim that interest has been paid up to the first of April, 1856. They admit that the principal of the bond is due, together with interest from that date, less the sums paid by the defendants for the taxes assessed on the principal of the debt, from the date of the mortgage, up to and including the year 1861. The taxes so paid, the defendants claim, are a lawful deduction to be made from the interest due and accrued upon the mortgage debt. The only question submitted for decision is, whether upon the facts disclosed by the bill and answer, the defendants are entitled to have such deduction made. It is admitted that the interest has been paid for four years after the date of the bond. The defendants clearly cannot, in an action at

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law, recover back any part of the interest thus voluntarily paid with a full knowledge of the facts. Money paid voluntarily cannot be recovered back, although it was not legally or equitably due. *Volenti non fit injuria.*

Upon this principle, it was held that an occupier of lands, who during a course of years paid the property tax to the collector under the statute, 46 Geo. 3, chap. 65, and likewise the full rent, as it became due to the landlord, without claiming, as he might have done, any deduction on account of the tax, could not maintain an action against the landlord for any part of the tax so paid. So where a tenant pays *property tax* assessed on the premises, and omits to deduct it in the *next* payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord. *Denley v. Moore*, 1 Barn. & Ald. 123; *Stubbs v. Parsons*, 3 *Ibid.* 516; *Broom's Legal Maxims*, (5th ed.) 201, 204.

So if the land tax and paving rates are not deducted from the rent of the current year, they cannot be deducted, or the amount of them be recovered back from the landlord, in any subsequent year. *Andrew v. Hancock*, 1 Brod. & Bing. 37.

In *Stubbs v. Parsons*, Bayley J., said: the true construction of the act is, that a payment of the land tax can only be deducted out of the rent which has then accrued or is then accruing due, for the law considers the payment of the land tax as a payment of so much of the rent then due or growing due to the landlord; and if he afterwards pays the rent in full, he cannot at a subsequent time deduct the overpayment from the rent.

The act of 1854, *Nix. Dig.* 851, § 64, should receive a similar construction. If the holder of the mortgage resides in the township or county where the mortgaged premises lie, the tax is assessed upon him. If the mortgagee resides elsewhere, the tax on the money secured by the mortgage is to be assessed against and paid by the mortgagor in the township where the lands lie. And it is enacted, that “*the receipt of the collector shall be a legal payment for so much of the interest of said mortgage, and be allowed and deducted*

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therefrom by the mortgagee." The payment of the tax and the receipt of the collector is a *legal payment* for so much of the interest of the mortgage, and is to be deducted therefrom. It operates only as a payment of the *interest*, not of the principal. It must be intended to be a payment of the accrued and accruing interest, not of interest to grow due in future. It is not a set-off to be made against a demand that may afterwards arise, but a payment of a subsisting or accruing debt. This is the natural interpretation of the language, and it is in accordance with the sound policy of the act. The tax is upon the property of the obligor. The burden is upon him. He is entitled not only to be informed of its existence and amount, but to pay it year by year as it is assessed. Not only serious inconvenience but great injustice would be produced by suffering the mortgagor to pay the interest on the bond for a series of years without claiming any deduction for taxes, and then to claim the whole amount in a single year. The burden would be still greater and the injustice more apparent, if the claim is permitted to be made after the death of the mortgagor, or an assignment of the mortgage. Its operation then would be to compel one party to pay the tax assessed upon the property of another, and the claim if permitted, may be set up after any lapse of time however great. No statute of limitations can run against it, for the statute makes it, not a set-off or legal demand, but a *payment* of the interest *pro tanto*.

But there is another and equally decisive objection in this case to the allowance of the taxes as a payment of interest. There is no averment in the answer, that when the taxes were assessed, the mortgagee did not reside in the township or county where the mortgaged premises lie. For all that appears, the mortgagee may have resided in the county where the mortgaged premises lie, or he may have resided out of the state. In either event, the defendants are not entitled to the deduction. If the holder of the mortgage resided in the township where the mortgaged premises lie, the tax should have been assessed against him, and not against the

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mortgagor. If he lived out of the state, he was not liable to be assessed, nor is the mortgagor entitled to any deduction on that account. The act of 1854 does not subject to taxation, the bonds, mortgages, and other choses in action of persons who are not inhabitants of this state. *State v. Branin*, 3 Zab. 484; *Dolman v. Cook*, 1 McCarter 56.

The facts stated in the answer should show a valid defence to the claim.

There must be a reference to a master, with instructions to disallow the claim for deduction from the arrears of interest on account of taxes.

WILLIAM P. MICHENER, WILLIAM HOUSE and JOSHUA THOMPSON, Commissioners, &c., vs. STACY LLOYD and others.

Land owned by two tenants in common was ordered to be sold by commissioners appointed to make partition thereof. At the first sale the land was struck off to one of the tenants in common, who refused to accept the deed or pay the purchase money. The premises were thereupon again exposed to sale, and struck off for a less sum. By the terms of the first sale, if the purchaser refused to comply with the conditions, the property was to be resold, and the purchaser held liable for the loss. The deficiency on the second sale was \$1200. On the distribution of the proceeds of sale, the co-tenant claimed, as against the purchaser at the first sale, an allowance for the loss sustained by reason of his non-compliance with the conditions. The claim being disputed, and an order of distribution having been made, the commissioners refused to pay over the money in compliance with the terms of the order, and filed a bill of interpleader asking to have the right determined. There was some dispute as to the terms of the order for distribution. *Held*—

1. The only legal evidence of the terms of the order of the court, is the record or a duly certified copy thereof. Evidence of what passed at the time of making it, or of the precise terms of the order itself as directed by the court, is incompetent.

2. The deficiency incurred by a resale of the property, can only be recovered by an action brought by the commissioners, and when recovered, be distributed by order of the court, as part of the money arising from the sale of the land.

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3. The deficiency can constitute no legal set-off against the claims of the defaulting co-tenant for his share of the proceeds of sale under the order for distribution.

4. The case furnishes no ground for a bill of interpleader by the commissioners.

S. A. Allen, for complainants.

A. Sinnickson, for Lloyd.

THE CHANCELLOR. The complainants are commissioners, appointed by a judge of the Court of Common Pleas of Salem county, to make partition of certain real estate owned by Stacy Lloyd and Thomas Mulford as tenants in common. The commissioners having reported that partition of the land could not be made, they were ordered to sell the same under the provisions of the statute. At the first sale, Lloyd, one of the tenants in common of the land, became the purchaser for \$4030. Lloyd having failed to comply with the conditions of sale, and refusing to accept a deed or pay the purchase money, the premises were again exposed to sale and were struck off to Mulford, the other tenant in common, for \$2830.

The sale having been confirmed, he paid the purchase money and received title. One half of the net proceeds of the sale were ordered by the court to be paid to Mulford, one of the owners, and after satisfying, out of the other half of the net proceeds, certain encumbrances upon the share of Lloyd in the said land, the court directed the residue thereof, being \$660.60, to be paid to Lloyd, the other tenant in common.

One of the terms of the first sale was, that if the purchaser refused to comply with the conditions and pay the purchase money, the property would be resold, and if it sold for less than at the first sale, the purchaser would be held liable for the difference. The deficiency on the second sale was \$1200. Mulford claims, as against his co-tenant who became the pur-

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chaser, that he is entitled to receive one half of this sum. Notice of this claim having been given to the commissioners, they refused to pay over the money to Lloyd in compliance with the order of the Court of Common Pleas, and filed their bill of interpleader in this court, asking to have the right determined.

The order of the Court of Common Pleas expressly directs the commissioners to pay over the net proceeds of the sale of Lloyd's share of the land, after satisfying the legal encumbrances thereon, to Lloyd. There is no allegation of fraud in obtaining the order. Some question is raised and evidence offered, as to what passed at the time of making the order, and as to the precise terms of the order itself as directed by the court. But this evidence is clearly incompetent. The only legal evidence of what the order actually made was, is the *record* or a duly certified copy thereof. The court will not go behind the record to ascertain what was said at the time of making the order. If the entry in the minutes was erroneous, the proper remedy would have been by application to the court in which it was made. But it is evident that there was no mistake in the entry of the order. It is, in fact, the only order that could properly have been made. The statute requires that the moneys arising from the sale shall be ordered by the court to be paid by the commissioners to the parties interested in the real estate so sold, in proportion to their respective rights in the same. *Nix. Dig.* 605, § 21. The court has no alternative and no discretion on the subject. The encumbrances on the respective shares are of course to be satisfied. The value of each share of the property, over and above the encumbrances thereon, alone represents the right of the respective owners. It was the duty of the commissioners to have paid the money in compliance with the order of the court. The order would have afforded them full protection. The rights of those interested were settled by the determination of the court.

The complainants are entitled to no relief in equity. If the first purchaser was liable for the amount of the deficiency

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which occurred upon the resale, it was the province of the commissioners to have enforced its payment, by suit or otherwise, and to have carried the money thus recovered to the account of sales. It would thus have represented a part of the moneys arising from the sale of the real estate, and been subject to distribution among the owners. But what right have the commissioners *now* to recover this money? The net proceeds of the sale have been ascertained and distributed, under the order of the court. The duty of the commissioners is ended. They are *functi officio*, and if the money could be recovered by them, by what authority is it to be drawn out of their hands? What claim has the owner of the land to it? He cannot claim it as a part of the moneys arising from the sale of the land. That has already been ascertained and paid to him under the order of the court. If recovered at all, it must be as damages sustained by the breach of the contract contained in the conditions of sale. That contract was with the commissioners, and they alone would have the right to enforce it. And the remedy upon that contract would properly not be in this court, but in a court of law. Until the right to recover upon that contract is established, it is not perceived that either the commissioners or the land owners have any equity which would enable them to come into this court for relief.

But if there be a subsisting equity as between Mulford and Lloyd, upon which the former is entitled to relief, it is clear that there is no ground upon which these complainants can file a bill of interpleader; because Mulford has no legal or equitable claim as against them for the fund. It is in their hands as the trustees of Lloyd. They are required by law and are directed by the order of the court, to pay it to him. No lien or claim upon the fund has been created or acquired since the order of the court, which can raise any doubt as to the rights of the parties. No attachment or execution has been served. It is simply an attempt of Mulford to enforce a supposed equitable or legal demand against Lloyd, by preventing the trustees from paying over the

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money to the rightful owner. This is not the office of a bill of interpleader. *Mitford's Eq. Pl.* 142; *3 Daniell's Ch. Pr.* 1759; *Story's Eq. Pl.*, § 292; *2 Story's Eq.*, § 816, 817.

The bill is not filed for the protection of the complainants against the adverse claims of the defendants. They are, as the evidence shows, indemnified by Mulford, one of the contesting claimants to the fund. The bill is obviously filed, if not at his instance, yet in his interest and for his benefit. His answer is a mere echo to the charges and allegations of the bill.

The bill must be dismissed with costs.

JAMES C. ATWATER *vs.* FREDERICK W. WALKER.

1. The validity of a contract must depend upon the laws of the state where the contract was made.
 2. Where the answer alleges generally, that the contract upon which the suit is brought is usurious, without any more specific allegation, it must be intended that the defence is that the contract is in violation of the statutes of this state, and to that objection alone the defence must be limited.
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Mills, for complainant.

If mortgage is usurious, it is so by law of New York. The usury depends on the *lex loci contractus*.

It was incumbent on the defendant to show fact as well by pleadings as proofs. *Campion v. Kille*, 1 *McCarter* 229.

If the security was once valid, it cannot be invalidated. *Donnington v. Meeker*, 3 *Stockt.* 362; *Varick's Ex'r v. Crane*, 3 *Green's Ch. R.* 128; 19 *Johns. R.* 294; 2 *Ibid.* 455; 2 *Caines' Cases in Error* 66; *Chitty on Contracts* 607.

Cutler, for defendant.

THE CHANCELLOR. The only defence raised by the plead-

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ings to the claim of the complainant for a decree is, that the mortgage sought to be foreclosed is void for usury. The answer states the circumstances under which the loan was made, which are relied upon as constituting the usury, and prays that the mortgage, so executed by the defendant to the said James C. Atwater, may be decreed to be usurious, void, and of no effect. It appears by the evidence that the negotiations for the loan were all carried on in the city of New York, and that the loan was made there. The complainant was at the time a resident of the state of New York. It is clearly a New York contract, and its validity must depend upon the laws of that state.

It has been repeatedly held in this court, that where the answer alleges generally that the contract is usurious, without any more specific allegation, it must be intended that the defence is that the contract is in violation of the statutes of this state, and to that objection alone the defence must be limited. *Cotheal v. Blydenburgh*, 1 *Halst. Ch. R.* 19; *Dolman v. Cook*, 1 *McCarter*, 56; *Campion v. Kille*, *Ibid.* 229.

Though the point had been repeatedly decided in this court and elsewhere, it had not been formally sanctioned by the Court of Appeals of this state at the time this cause was argued. An appeal had been taken in the case of *Kille v. Campion*, and that point, among others, had been argued and was then pending undecided in that court. The decision has since been pronounced, affirming the decree and sustaining the principle as hitherto understood and recognized.

The ground of the principle is stated with great clearness and force by Mr. Justice Vredenburgh, who delivered the opinion of the Court of Appeals, and the doctrine must be regarded as finally settled.

This renders the evidence in the cause inapplicable to the issue, and the defence unavailing.

This point was treated at the hearing as an open question, and the cause was heard upon the merits. Inasmuch as a large amount of testimony has been taken, and the case upon the merits was very fully discussed by counsel, it may be

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proper and satisfactory to the parties to state that, aside from the technical difficulty arising out of the pleading, I am of opinion that the defence was not sustained by the evidence. The usury was not proved.

The complainant is entitled to a decree.

NOTE.—From this decree of the Chancellor an appeal was taken, and the decree unanimously affirmed at November Term, 1863.

PETER HOAGLAND *vs.* HARMAN H. TITUS and others.

1. Where the evidence in a cause fails to prove that a transfer of promissory notes was procured by fraud or false accusation, or by any combination or conspiracy, it seems nevertheless, that the transfer may be held invalid on the ground of *surprise*, coupled with evidence of mental weakness.

2. On this ground under the circumstances a re-hearing was ordered.*

The bill in this cause was filed May 11th, 1861. Pursuant to the prayer of the bill an injunction issued, restraining the defendants from transferring or negotiating three several notes, amounting to \$3429, endorsed by the complainant to Harman H. Titus. A motion was made to dissolve the injunction and argument was had thereon. The motion was denied. The opinion of the Chancellor denying the motion, will be found reported in 1 *McCarter* 81.

The complainant now seeks to set aside the transfer of the notes.

J. V. Voorhees and Ransom, for complainant.

1. The transfers were without consideration.
 2. Consideration in part illegal; it being the suppression
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*The cause was not re-heard, the parties having in the meantime effected an amicable settlement.

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of a criminal prosecution. 1 *Parsons on Contracts*, 380, and cases cited in note; *Collins v. Blantern*, 2 *Wils.* 347; *Armstrong v. Toler*, 11 *Wheat.* 258; *Deering v. Chapman*, 22 *Maine* 488; *Keir v. Leeman*, 9 *Queen's B.* 371; *Gardner v. Maxey*, 9 *B. Mon.* 90; 7 *Greenl.* 461; 3 *Comst.* 19; 2 *Peters* 527.

3. Transfer procured under *duress*.

Beasley, for defendants.

The defendants are not here to enforce a contract. The complainant is not in a position, therefore, to invoke the benefit of the second and third points.

There is no *duress*. 1 *Parsons on Cont.* 319, 320; 1 *Story's Eq. Jur.*, § 239; 1 *Bla. Com.* 130, notes; 1 *Eden on Inj.* 27.

It does not fall within cases of *surprise*. *Evans v. Llewellyn*, 2 *Bro. Ch. R.* 150; 1 *Cox* 333.

THE CHANCELLOR. On the twelfth of February, 1861, Peter Hoagland, the complainant, endorsed and delivered to Harman H. Titus, one of the defendants, three promissory notes, then held and owned by him, *viz.* one made by Dennis S. Hoagland to the complainant, for \$2179; another made by Harman Hoagland, for \$950; and the third made by Christopher S. Hoagland, for \$300; all of which were then past due, and which remained in the hands of the endorsee at the time of filing the bill.

The bill seeks to set aside the transfers of these notes on the ground that they were obtained by fraud, false accusation and threats, and without any value whatever; by means of a fraudulent conspiracy between the defendants, the said Harman, and his sister and mother.

On filing the bill an injunction issued to restrain the transfer of the notes by the endorsee.

So far as the case rests upon the charges that the transfer of the notes was procured by fraud or false accusation, or by any combination or conspiracy between the defendants, it is not sustained by the evidence. Jane Titus, one of the de-

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fendants, is the sister of the complainant, and the mother of Harman H. and Lenah Titus, the other defendants. At the time of this transaction, the complainant lived with his sister and her family, in the county of Somerset. On the eleventh of February, 1861, a note was sent, at the mother's request, to her son Harman, apprizing him that his sister Lenah was pregnant by her uncle, the complainant, and that the family wanted his advice. The note was received by the son on the morning of the twelfth of February, at the city of Trenton. He went that evening to Somerville, where, after consulting counsel and in pursuance of his advice, he sued out a warrant upon his own affidavit against the complainant on a charge of fornication, placed the warrant in the hands of a constable, and accompanied by the officer, reached his mother's house before midnight, and within three hours afterwards the notes were endorsed and delivered to Harman H. Titus. There is nothing in the case to justify a suspicion that the son was not actuated in the whole transaction by the best of motives, or that the son and the mother did not act upon the full conviction and belief that the complainant was guilty of the crime laid to his charge.

Nor is there any evidence to justify the belief that the charge against the complainant is false. The mother of the child, in her answer, expressly states that he is the father of the child, and if there were room for doubt upon that point, there is the most satisfactory evidence that the complainant, notwithstanding the express allegations contained in his bill to the contrary, was guilty of criminal intercourse with the mother of the child. The investigation of the case must proceed upon the ground that there was neither a false charge, nor conspiracy, nor fraud resorted to, to obtain the transfer of the notes.

Nor is there any evidence that the transfers were made under duress. The evidence is, that the warrant was not served, that the officer was not seen by the complainant, that the presence of the officer in the house, or even the fact of the existence of the warrant, was not made known to the

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complainant until after the notes had been endorsed and delivered.

It is further urged that the endorsement of these notes is founded upon an illegal consideration, to wit, the suppression of a criminal prosecution, or if that fact is not established, then that the contract was without any valuable consideration whatever, being founded merely on the moral obligation resting on the complainant to repair the wrong which he had inflicted. It is true that both these defences are available at law, but it is apparent that if the bill is dismissed and the injunction dissolved, the notes may be at once transferred to a *bona fide* holder, and the complainant be thus deprived of all opportunity of making defence. I am the more disposed to retain the cause, in order to the discussion of another objection suggested on the argument, *viz.* that the contract is invalid on the ground of surprise, coupled as it is with evidence of the mental weakness of the complainant. The evidence on the part of the defendants is, that the complainant, as a recompense for the injury he had inflicted upon his niece, and in order to her future support, not only assigned to her the notes in question, amounting to about \$3500, but that he also agreed to transfer to her every article of personal property he owned, even to his clothing, amounting in value to \$500 more. Having thus voluntarily, as is alleged, agreed to strip himself of his entire property, he refused to go to Somerville to make a legal transfer of the property, and was only induced to go by threats of arrest and the influence of the officer who held the warrant and the authority to arrest him. The claim to the residue of the complainant's property, as well as the execution of any further instrument of transfer, was abandoned under the advice of counsel, but not from any objection made by the complainant. On the contrary, he told them to take all he had, though in a manner that suggested to counsel the idea that it was not of his free will. A release was prepared by counsel of all claims against him in relation to the transaction, but he utterly refused to accept it. On his return from Somerville he borrowed money

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to pay the fees of counsel employed against him, of the officer who arrested him, and the travelling expenses of the party making the charge against him. All this, it is suggested, was induced by the promptings of remorse, in order to make atonement, as far as possible, for the deep wrong that he had inflicted. It may be so. But it also gives rise to considerations of a different character, and in connection with the previous history of the complainant, renders it proper that the case should undergo a more full discussion and consideration. I shall order a re-hearing. In the meantime, I earnestly hope that an effort will be made by the parties to effect an amicable settlement of the difficulty. A great wrong has been done by the complainant for which he ought to make reparation, and it is desirable that it should be promptly done, without further litigation, expense or occasion for scandal. If the settlement cannot be made, I will direct the cause to be set down and re-heard at the present term.

ANDREW J. CUMMINS *vs.* EZEKIEL LITTLE and others.

1. The well settled doctrine of the court of equity is, that *mere inadequacy of price* affords no ground of relief, either against a private contract or a judicial sale.
2. But inadequacy of price may be so gross and unconscionable as to shock the conscience, and, in the case of a private contract, to amount to conclusive and decisive evidence of fraud; or, in the case of a judicial sale, to *constructive fraud and abuse of trust*.
3. That is a public and a proper place for setting up advertisements, contemplated by the act regulating sales of real estate, which is likely to give information to those interested, and who may probably become bidders at the sale.
4. The sheriff is bound to conduct the sale so as to protect the rights and promote the interests of all parties in interest, and to this end to secure, as far as practicable, the most general diffusion of the notice of sale.
5. The true test of a proper exercise of discretion by the sheriff in setting up notices is, whether he has set them up as a discreet man, desirous of effecting a sale of his property to the greatest advantage, would have done.

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6. If a sheriff abuses, to the detriment of subsequent encumbrancers or of the defendant in execution, the discretion vested in him by law to make sale under execution, a court of equity will grant relief, although there has been a formal compliance in the conduct of the sale with all the requirements of the statute.

7. It is not necessary that there should be *actual* fraud, committed or meditated. The abuse of discretion in the execution of the trust is a *constructive* fraud, against which equity will relieve.

8. Where a sale by a public officer is conducted in violation of the spirit and policy of the law, and so as in fact to defeat the just claims of encumbrancers, or greatly to prejudice the rights of the defendant in execution, the sale will be set aside, though the formal requirements of the statute have been complied with.

Depue, for complainant.

1. We allege *fraud*, or gross negligence in conducting sale amounting to fraud; also fraud in keeping bidders from sale.

2. Accident or *surprise* in mode of advertising sale.

3. Sale void, because the property was not legally advertised. *Den v. Philhower*, 4 *Zab.* 796; *Philhower v. Todd*, 3 *Stockt.* 313.

Principles upon which equity interferes. *Seaman v. Rig-gins*, 1 *Green's Ch. R.* 214; *Skillman v. Holcomb*, 1 *Beas.* 131.

No distinction between those principles in law and equity. *Eberhard v. Gilchrist*, 3 *Stockt.* 166.

Vanatta, for defendants.

Complainant, if he recover at all, must recover upon case made by the bill. *Andrews v. Farnham*, 2 *Stockt.* 91; *Parsons v. Heston*, 3 *Stockt.* 155; *Day v. Lyon*, *Ibid.* 331; *Brantingham v. Brantingham*, 1 *Beas.* 160.

Insufficiency of consideration will not suffice to disturb sale. *Saxton* 3; *Ibid.* 55; 1 *Green's Ch. R.* 214; 2 *Ibid.* 214, 460; 3 *Halst. Ch. R.* 34; 3 *Stockt.* 167.

The court will not visit upon the purchaser the misconduct of the sheriff, unless purchaser be a participant in the fraud.

If a man takes a conveyance without search, there is no *surprise*. *Broom's Leg. Max.* 692-3; *Dart on Vendors* 406;

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1 Story's *Eq. Jur.*, § 251; 4 Johns. *Ch. R.* 566; *Parkhurst v. Cory*, 3 Stockt. 233; *Skillman v. Holcomb*, 1 Beas. 131.

Beasley, in reply.

The policy of the court is to protect judicial sales. But it does not extend to encourage encumbrances. *Tripp v. Cook*, 26 Wend. 158.

Mr. Beasley further cited *Tiernan v. Wilson*, 6 Johns. *Ch. R.* 411; *Merwin v. Smith*, 1 Green's *Ch. R.* 182; *Williamson v. Dale*, 3 Johns. *Ch. R.* 290; *Collier v. Whipple*, 13 Wend. 226; *Howell v. Baker*, 4 Johns. *Ch. R.* 118; 2 *Phill. Ev.*, § 114; 1 *Greenl. Ev.*, § 115.

THE CHANCELLOR. The bill is filed to foreclose a mortgage from Little to the complainant, for \$3249.33, bearing date on the twenty-first of November, 1859. The mortgage covers three tracts; one, a timber lot of thirty-nine acres; another, known as the saw mill tract, of one acre and forty-three hundredths; and the third, a farm of one hundred and sixty-five acres and thirty-six hundredths. The first two lots were of comparatively small value. The value of the farm was \$9000. It was subject to three prior mortgages, amounting to \$3870.34. On the fourth of November, 1861, the equity of redemption in the farm was sold by the sheriff to satisfy an execution at law, for \$80.41, the amount of debt and costs due upon the execution. The judgment under which the property was sold was prior to the complainant's mortgage, and if the sale be valid his security is forfeited.

There is no material controversy as to the value of the property sold or the encumbrances upon it. The farm was worth at least \$9000. The total amount of encumbrances, including interest to the day of sale, did not amount to \$4800. The equity of redemption, which was sold by the sheriff, was worth over \$4000. The purchaser came to the sale prepared to pay that price for it. It was arranged before hand among those interested in the purchase, that they would bid upon

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the property enough to protect themselves and secure their debt. This could not be done except by satisfying the previous mortgage of the complainant. This property, which was worth \$4000, and which the purchasers were prepared to take at that price, was struck off and sold for \$80.41. Standing alone, independent of every other fact, ought such a sale to be sustained? The well settled doctrine of the court of equity is, that mere inadequacy of price affords no ground for relief, either as against a private contract or a judicial sale. The sound rule of public policy is, that biddings at judicial sales should be encouraged and that persons should not be deterred from bidding, even for purposes of speculation, by the apprehension that the sale will be set aside, because it was made below its full value. Property at a forced sale must frequently be sold greatly below its real value. Commercial revulsions, financial embarrassment, national distress, stringency in the money market, uncertainty about the title, and a variety of other causes, may depress the price of property far below its actual value. If mere inadequacy of price were a ground of relief, the principle would operate as a *stay* law. It would often happen that no valid sale could be made. If, therefore, the inadequacy of price be only such as is ordinarily experienced, or as may naturally be expected to result from the vicissitudes of human affairs, it affords no ground for the interposition of a court of equity. But there must be some relation between the price paid and the value obtained. It must be a sale, not a wanton sacrifice. It must be made in the exercise of a sound discretion, and in the due execution of a public trust; not an abuse of that discretion and a perversion of that trust. Mere inadequacy of price is no ground for relief, but fraud is: and the inadequacy of price may be so gross and unconscionable as to shock the conscience, and, in the case of a private contract, to amount to conclusive and decisive evidence of fraud; or in the case of a judicial sale, to constructive fraud and abuse of trust.

No judge or jurist has more inflexibly maintained or ably vindicated the familiar principle, that mere inadequacy of

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price is no ground of relief against a judicial sale, than Chancellor Kent. Yet in a case where the sacrifice of property was much less than in the present instance, and the abuse of trust no more glaring, that eminent jurist said, "such a sale carries an abuse on the very face of it, and leads to the most oppressive speculation." *Tiernan v. Wilson*, 6 Johns. Ch. R. 413.

I have said thus much for the purpose of vindicating a familiar and well settled principle from perversion and misapplication, and in order to guard against any inference, that because this case is decided upon other grounds, the objection on the score of gross and unconscionable inadequacy of price is regarded as untenable. There are other grounds which admit of no question, upon which this case may be disposed of.

While mere inadequacy of price is not of itself a ground of relief, it is always a circumstance which quickens the diligence of the court in investigating the conduct of the officer, and calls into prompt and vigorous exercise its protecting agency against abuse of power.

The complainant's mortgage was the first encumbrance on the land sold, after the execution under which the sale was made. The effect of the sale was utterly to defeat that encumbrance, and to deprive the complainant of an unquestioned security for his debt. Was that result the consequence of the complainant's own laches? or did the course of the sheriff in conducting the sale naturally lead to the sacrifice of the property and the defeat of the complainant's rights? The complainant was not present at the sale; he had no notice of it. He testifies that he neither had notice of the time or place of sale, nor even of the existence of the judgment and execution. This, it is conceded, will not protect him, if he had the notice which the law contemplates, and the sale was in other respects conducted in accordance with the spirit and intent of the statute.

Was it properly advertised? The farm lies in Independence, the most eastern township in the county. It is

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distant one mile and an half from Vienna; two miles from Hackettstown; three, from Danville; four, from Allamuchy; all villages in that township. The only advertisement in the township was at a store in Allamuchy, four miles distant, near the extreme eastern border of the county. One in the clerk's office at Belvidere, fourteen miles distant from the farm, and three in the village of Washington, twelve miles distant. There is nothing in the evidence to indicate that there were circumstances which rendered Allamuchy and Washington more appropriate places for putting up notices, than villages much nearer by, and to which the farmers of the vicinity would more naturally have resorted. Three notices were put up at Washington, as a mere matter of convenience to the officer who resided there. The most striking commentary upon the fitness of the selection is, that not more than one of all the witnesses examined who were interested in the sale, derived his knowledge of the sale from the sheriff's advertisement, or even saw the notices before the day of sale.

It is not alleged that the places selected for setting up these advertisements, was not a compliance with the letter of the statute. It was so: and it would have been equally a compliance with the letter of the statute, if, after putting up one notice within the township of Independence where the farm lies, the other four had been set up at unfrequented hotels or blacksmith shops in the most remote extremities of the county, where they were certain never to be seen by the parties interested or who were likely to become purchasers. The statute simply prescribes that the notices shall be set up at five public places. A public place is a relative term. What is a public place for one purpose, is not for another. A blacksmith shop in the country, or a tree at the intersection of public roads, would be a public place within the contemplation of the statute, if in the vicinity of the lands, but it would clearly be an abuse of discretion, thus to advertise town lots in a place twenty miles distant. That is a public and a proper place for setting up notices, which is

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likely to give information to those interested and who may probably become bidders at the sale. A great deal is necessarily and designedly left to the discretion of the officer. And when that discretion is fairly exercised, courts will not lightly interfere with its exercise. Still, courts will guard against its abuse. They will see that it shall not be so exercised as to strip an unfortunate debtor of his property or to defeat the just claims of an honest creditor. The sheriff in selling land, exercises an important public trust; and in effecting the sale, he is bound to conduct it so as to protect the rights and promote the interests of all the parties in interest, and to this end to secure, as far as practicable, the most general diffusion of the notice of sale. Would any discreet man, desirous of effecting a sale of this farm to the greatest advantage, have set up his notices as the sheriff did? That is the true test of the proper exercise of discretion by the sheriff.

But was the place of sale proper? The law prescribes no place of sale. It leaves it to the discretion of the sheriff. The general, if not universal custom in this state down to a recent period, was to sell real estate in the country upon the premises or at the nearest and most convenient public house. That practice has fallen in great measure into disuse, and it is believed to be not unusual to sell lands at the county seat. There are obvious advantages in that practice. It affords facilities for resort to the records and to counsel, for settling questions respecting the title. And in some cases, especially where the property is convenient to the county seat or bidders most likely to be secured there, such course may be advisable. But would a sheriff be justified in advertising unimproved city lots of small value, the purchasers of which would be looked for among the operatives and mechanics and laborers of the city, to be sold at a place ten or twenty miles distant? Would any man of ordinary discretion adopt that course to effect an advantageous sale? Would it be a proper exercise of discretion in a sheriff, without some special cause, to adopt that course? And if the property was utterly sacrificed for want of purchasers, would the sheriff be justified

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by the pretext that he was authorized by law to sell where he pleased?

It might be suggested that Washington, the place selected by the sheriff for setting up three of these notices, was a peculiarly appropriate place, both for setting up the advertisements and for making the sale, inasmuch as it was in the midst of a wealthy and prosperous agricultural community, where purchasers for valuable farms might be expected to be found. In point of fact, there was not a bidder from that vicinity. The explanation may be found in the character of the sheriff's advertisement. The property is there described as one lot of land and premises, situate in the township of Independence, containing one hundred and sixty acres, more or less, with the appurtenances. Who would conjecture that a valuable farm was to be sold under that advertisement? Such description in the immediate vicinity of the lands might have been understood. But what information did it convey to strangers? Was it an advertisement calculated to attract the notice of buyers, and to secure an advantageous sale? Is it a description that any sane man desirous of selling a farm, would have given of it?

But if the mode of advertisement and place of sale are open to exception, the manner of conducting the sale is still more so. The entire farm of one hundred and sixty-five acres, worth, as the evidence shows, from \$9000 to \$10,000, encumbered for less than half its value, is put up to satisfy a claim of \$80.41, including debt, interest, costs and sheriff's fees. It cannot be doubted that any five acres of the land would have sold for enough to satisfy the demand. The fact that the whole farm was offered for sale to pay so paltry a sum, was in itself calculated to excite distrust. No honest purchaser would have bid with an expectation of buying. He must have believed, either that the property was encumbered, or that there was a defect of title, or the plaintiff being a sister of the defendant and the principal bidder his brother-in-law, that it was a mere formality by way of cover or of perfecting a title. Not only so, but the sheriff announces

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to the bidders that if \$80.41 are bid, he will strike the property off; if not, the sale will be adjourned. That was the instruction he had received from the attorney, and that is the mode in which the sheriff, in the exercise of his discretion, discharges his trust as a public officer. No course could have been adopted, more effectually to discourage competition and defeat a fair sale.

The property was cried for ten minutes, and was then struck off to the defendant, Daniel S. Ayres, who made, in reality, the only bid at the price which the sheriff had previously agreed to accept. There was a bid of \$30, made by a person who was totally irresponsible. Other bids were made by two persons, who were concerned with Ayres in the purchase, and who, it is evident, were not bidding against him. The bids were all merely colorable, for the sheriff had previously announced that he would not sell under the amount due on his execution. As soon as that sum was bid, the property was struck off.

The whole conduct of the sheriff, in the advertisement and sale of the property, was a gross abuse of discretion. So far as the real design and purpose of the statute were concerned, it might as well have been sold at private sale. I accept it as a sound and clear principle, that if a sheriff abuses, to the detriment of subsequent encumbrances or of the defendant in execution, the discretion vested in him by law to make sale under execution, a court of equity will grant relief, although there has been a formal compliance in the conduct of the sale with all the requirements of the statute. It is not necessary that there should be actual fraud committed or meditated. The abuse of discretion in the execution of the trust is a constructive fraud, against which equity will relieve.

In arriving at this conclusion, no fraud or improper motive is designed to be imputed to the sheriff. The evidence does not warrant it. The fair presumption I think, from the evidence is, that the sheriff had no idea of the real value of the interest that he was selling, of the circumstances which

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surrounded the transaction, or of the effect of the sale upon the rights of the parties interested. Otherwise, it is scarcely credible that, as a right minded man and upright public officer, he would have struck off the property as he did. Nor has any fraudulent motive thus far been imputed to the purchaser. If he attended the sale as he alleges, and purchased the property in good faith, without fraud or dissimulation, for the purpose of protecting his rights, it would not have justified the conduct of the sheriff or sanctioned the validity of the sale.

But there are circumstances in the case tending strongly to establish actual fraud in the conduct of the sale. It is clear that Little, the defendant in execution, intended to have been at the sale and to have purchased the property, or to have had it secured for his benefit. He originally employed another party to bid in the property for him. Arrangements for that purpose had been made. Finding that Ayres, his brother-in-law, who was a subsequent encumbrancer, intended to be at the sale to secure his own interest, he entered into negotiations with him, which continued up to the very day before the sale. What the precise character of those negotiations were is not clear. Nor is it material. It is perfectly certain that the defendant intended to be at the sale. His deep interest in the property rendered it certain he, or some one on his behalf, would be present. He left home at an early hour for that purpose. He arrived at the place of sale shortly after the property was struck off. He swears that he told the purchaser the day before, that he would be at the sale by half past one o'clock. Ayres admits that he expected Little to be at the sale. That expectation must have been derived from what passed between them the day previous. Ayres, with a full knowledge of this fact, tells the sheriff that whether he buys or not, depends upon how soon he sells, not upon the price bid. Why so? Unless he knew that Little was coming, and that he would either have his rights protected or the sale adjourned. It was the first day at which the property was advertised, and an adjourn-



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ment would have been granted, if desired. The property is put up and cried for ten minutes, long enough to have sold a lot of rubbish or a broken down horse; a very spirited competition takes place between the purchaser and two others, for whom the purchaser was bidding and whose interests were the same as his, at prices which they knew the sheriff would not accept; the price named by the sheriff is bid, and thereupon, in the absence of the defendant in execution who arrived soon after, in the absence of a subsequent encumbrancer who was kept from the sale by information that it would not take place, a farm worth \$9000, and the encumbered value of which exceeded \$4000, was struck off for \$80.41.

It appears to me, that in every aspect of this case the sale is one which equity will not tolerate. It was conducted in violation of the whole spirit and policy of the law, so as to defeat the just claims of the complainant, and greatly to prejudice the rights of the defendant in execution. The evidence justifies the belief, that one of the advertisements was not set up the length of time required by law, and that the title in the hands of the purchaser would be worthless upon that account. But this ground is not presented by the bill, and I deem it unnecessary to discuss the evidence upon that point or to lay any stress upon it.

The sale by the sheriff will be declared illegal and inoperative, the injunction restraining the delivery of the deed made perpetual, and the complainant's mortgage be decreed to be a valid and subsisting encumbrance upon the farm, to be paid in its due order and priority.

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JOHN S. ROBBINS, administrator of Nancy T. Long, *vs.* JAMES M. LONG.*

1. In an *action at law* upon a penal bond, with condition for the payment of money only, the plaintiff is entitled to recover the full amount of the penalty as a *debt*, and the *excess* of interest beyond the penalty in the shape of *damages* for the detention of the debt.

2. Upon a *bill in equity* for the recovery of a bond debt, either upon the bond itself, or upon a mortgage given to secure the bond, the obligee may recover the *full amount of principal and interest* due upon the bond, though it *exceed* the amount of the penalty.

The bill was filed to foreclose a mortgage for \$1000, given by the defendant to Nancy T. Long. The cause was heard upon the bill, answer and proofs; and an order of reference was made to ascertain and report the amount due upon the mortgage, and what part of the mortgaged premises should be sold. The master reported an amount due greater than the penalty of the bond, and advised the sale of a part of the mortgaged premises.

To the report of the master, the defendant filed the following exceptions:

1. The amount reported due is larger than the *penalty* of the bond.
2. If the property be sold as advised by the master, it will be sacrificed. It might be sold to greater advantage.
3. The master, under the circumstances, should have advised the sale of the whole, and not of a part, of the mortgaged premises.

Hearing on exceptions to master's report.

Vroom, for exceptant.

Depue, for complainant, contra.

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THE CHANCELLOR. The only exception relied upon is, that the amount reported by the master to be due to the complainant, exceeds the penalty of the bond. It is insisted that in equity there can be no recovery upon a money bond beyond the amount of the penalty. It is very clear that for a long period this was the well settled rule of the English Court of Chancery.

It was treated as a settled point, that equity will not relieve beyond the penalty of the bond, as early as the 26 *Charles 2*, (1674), in *Davis v. Curtis*, 1 *Chan. Cas.* 226. The books are full of cases, where the principle is applied to bonds with special condition, as to official bonds, indemnity bonds, and bonds for the performance of covenants, where the penalty is a mere security for the payment of unliquidated damages. But the cases are not, as has been sometimes supposed, confined to this class of bonds, but extend as well to mere money bonds. *Bromley v. Goodere*, 1 *Atk.* 75, (1743); *Grosvenor v. Cook*, 1 *Dickens* 305, (1757); *Gibson v. Egerton*, *Ibid.* 408, (1769); *Kettleby v. Kettleby*, 2 *Dickens* 514, (1775); *Tew v. Winterton*, 3 *Bro. Ch. R.* 489, (1792); *Clarke v. Seton*, 6 *Vesey* 411, (1801.)

In *Gibson v. Egerton*, the master allowed the penalties of *three bonds*, which was less than the amount of principal and interest due thereon. An exception taken to the master's report on this ground was overruled. The Lord Chancellor (Cowper) saying, he was so clear, that he wished he had been warranted in making the exceptant pay costs.

In *Kettleby v. Kettleby*, the estate was amply sufficient to pay all the debts. There were both specialty and simple contract creditors. The master in taking the account allowed full interest upon the latter, but refused to allow interest on the specialty debts, beyond the penalty of the respective bonds. On this ground, the bond creditors excepted to the report. Lord Bathurst, Chancellor, overruled the exceptions, reluctantly as he said, there being so over an abundant fund, but said that he was tied down by the constant and uniform usage of the court.

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There are cases that maintain a different doctrine. In *Lord Lonsdale v. Church*, 2 T. R. 388, Mr. Justice Buller held, that at law interest, in the shape of damages, might be recovered beyond the penalty. And in *Knight v. Maclean*, 3 Bro. Ch. R. 496, sitting for the Chancellor, he sustained exceptions to the report of the master, on the ground that he had not allowed interest beyond the penalty of the bond. But this decision was overruled on appeal to the Chancellor. And in *Clarke v. Seton*, Sir William Grant, the master of the rolls, said, the uniform rule in equity is never to go beyond the penalty. It must, I think, be admitted as a general rule well settled by the courts at Westminster, though certainly with some deviations, that in an action upon a penal bond there can be no recovery beyond the amount of the penalty. The application of the rule has in many instances, as in the case of *Kettleby v. Kettleby*, operated most unjustly, in placing specialty creditors in a much worse position than simple contract creditors. Mr. Chitty states that, with respect to interest, a bill of exchange is a better security than a bond, "for when the principal and interest on a bond are equal to the amount of the penalty the interest must thenceforth cease, for the obligor in a bond is not answerable beyond the amount of the penalty." *Chitty on Bills* 4.

That this application of a legal principle to the case of a money bond in favor of the obligor is alike inequitable and inconsistent with the intention of the parties, is too clear to admit of question. And the attitude of the English Court of Chancery upon this question, presents one of the most remarkable anomalies known to the law. It acts constantly upon the principle of giving relief beyond the penalty of the bond, on the ground that equity requires it. Thus where the amount of the penalty is small, as compared with the value of the subject of the agreement, the court has no difficulty in decreeing specific performance to an amount greater than that of the penalty. *Fry on Spec. Perf.*, § 70.

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So if the mortgagor comes into equity for relief against the penalty at law, the court will grant relief, only on his paying the whole amount of principal and interest due, though it exceed the penalty of the bond: upon the principle that he who asks equity must do it. *Hugh Audely's case, Hardress* 136; 1 *Eq. Cas. Ab.* 91, 92; *Bac. Ab., Obligations, A.*

So equity will carry the debt beyond the penalty, where the obligee is kept out of his money by injunction or is prevented from going on at law. *Show. P. C.* 15; *Pulteney v. Warren*, 6 *Vesey* 92.

So if the devisee of lands charged with the payment of a bond debt, neglect to pay in a reasonable time, he shall pay interest, though it exceed the penalty. *Anonymous*, 1 *Salk.* 154.

So where an advantage is made of the money. *Lord Dunstan v. Plunkett*, 2 *Bro. Parl. C.* 251. Or where the bond is only taken as collateral security. *Kirwane v. Blake*, 2 *Bro. Parl. C.* 333; 14 *Vin. Ab.* 460, "Interest" E.

The sole ground upon which relief has been denied to the obligee of a money bond beyond the amount of the penalty is, that at law the bond creditor is entitled only to the penalty of the bond, and that where the creditor comes into equity for a legal demand, equity will give the same relief as he would have been entitled to at law. *Grosvenor v. Cook*, 1 *Dickens* 208; *Hale v. Thomas*, 1 *Vernon* 349; *Mackworth v. Thomas*, 5 *Vesey* 330.

At law the penalty of the bond has always been considered the debt. Originally the obligor at law was required to pay the penalty as the debt, and could only be relieved in equity by paying the principal and interest money due. Such was originally its design, and such to this day it is in form. A debt justly due to be paid, the obligation to be void only upon the performance of the condition. It is clear, said the master of the rolls, in *Clarke v. Seton*, 6 *Vesey* 415, that both at law, and in equity the penalty is the debt, and upon this very ground it is urged that no interest can be recovered beyond

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the penalty. But if it be a debt, and if that debt become due, as it clearly does at law (in form at least) upon the breach of the condition, and judgment may be entered upon it, why may not interest be reckoned either upon the principal specified in the condition, or upon the penalty, to an amount equal to the sum due upon the bond? No form or principle of law is thereby violated. It is the constant practice of courts of law to recover interest beyond the penalty in the shape of damages, and yet the Court of Chancery in England, planting itself upon the rule at law, refuses to afford relief, which is both equitable and in accordance with the intention of the parties.

The English penal bond is in form, an anomaly. The bond is not given for the actual debt but for the penal sum, with condition that if the real debt and interest are paid at maturity, the bond is satisfied. If not paid at maturity, the bond is unsatisfied, and the penal sum has become the real debt. So the courts of law held. Equity said, no: whatever may be the form in substance, the amount of the obligation is a mere penalty which the obligee shall not enforce. He is entitled only to the principal and interest of the real debt. After a long struggle, with the history of which we are all familiar, equity triumphed. What purports to be in form the real debt, is but the penalty. The form is retained, the substance is changed. But if the form of the bond and the form of the remedy upon it be anomalous, the justice meted out to the parties is still more so. Equity says to the obligee, you shall not have the sum which the obligor bound himself to pay, and which he has acknowledged to be due, because, though in form a debt, in substance it is a penalty. The sum specified in the condition, with interest, is the real debt. But the moment the real debt exceeds the penalty, and the obligee asks for the amount due, the answer is, the penalty is the debt and you can have no more. But if the penalty is the debt, and the real debt and interest exceeds the penal sum so that it is no longer inequitable to demand it, why shall not the obligee have interest on the penalty?

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Courts of law say, he shall have it in the form of damages for the detention of the debt. Shall a court of equity hesitate to give it? The justice of the claim, and the anomalous attitude of the English courts upon the question, is thus clearly presented by Mr. Evans in his Notes to Pothier. 2 *Pothier on Obl.* (3d Am. ed.) 93.

"The allowing a party to have satisfaction to the extent not only of the debt which constitutes the penalty, but also of the interest on that penalty, which is the proper damages for its detention, appears to be no more than answering the claims of ordinary justice, when the non-performance of the condition is attended with circumstances that render the penalty, without such interest, an imperfect satisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect justice as is consistent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that, the case of *Holdipp and Otway* is a decisive authority. By the forms of law, one shilling damages is always awarded for the detention of the penalty, or any other debt; and these forms will be best rendered subservient to their substantial purposes by their being extended so far as may be necessary for securing the original obligation, provided they are not extended further than is consistent with their own particular character. And this is particularly the case with respect to bonds for securing money, when the principal and interest amount to more than the formal penalty. Whilst the courts restrain the legal operation of the formal instrument, in order that it may not be carried beyond the substantial purpose, on the one hand; it is very unequal justice not to allow the full extent of that operation when it is necessary to enforce such purpose, on the other. And it is the more extraordinary, that courts of equity, which in other cases so far sacrifice the form to the substance of the transaction as to enforce the specific performance of an agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be substituted for the perform-

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ance of the agreement, should so completely deviate from that practice in the very instance of all others, where the real purpose of the agreement is most indisputably evident, and where the measure of justice is with most facility ascertained. But so are the precedents; and it is easier to follow precedents than to investigate principles, and there is often a timidity in deviating from even those precedents which are most at variance with principles."

The weight of English authorities, as has been said, is decided, that at law as well as in equity, there can be no recovery upon a penal bond beyond the amount of the penalty.

There are, however, English authorities which maintain the right of the obligee to recover at law upon a money bond, in the form of damages for the detention of the debt, an amount exceeding the penalty. *Lonsdale v. Church*, 2 T. R. 388; *Buller's N. P.* 178; *Holdipp v. Otway*, 2 Saund. 106; *Francis v. Wilson*, 1 *Ryan & Moody* 105.

The American authorities very generally, if not uniformly, maintain the doctrine, that at law in an action upon a penal bond interest may be recovered in the form of damages, to an amount exceeding the penalty of the bond. *Smedes v. Houghtaling*, 3 *Caines R.* 48; *Moffatt v. Barnes*, 3 *Caines R.* 49, note a; *Cook v. Tousey*, 3 *Wend.* 444; *Lyon v. Clark*, 4 *Selden* 148; *Perit v. Wallis*, 2 *Dallas* 252; *Tennant's Ex'r v. Gray*, 5 *Munford* 494; *Moss v. Wood*, *R. M. Charlton* 42; *Goldhawk v. Duane*, 2 *Wash. C. C. R.* 323; *Sedgwick on Dam.*, (3d ed.) 446; 2 *Greenleaf's Ev.*, § 263.

In the case of *Goldhawk v. Duane*, Mr. Justice Washington stated that in the opinion of the court, nothing could be recovered beyond the penalty, but as the plaintiff's counsel were confident that the law was otherwise, the court left it to the jury to find interest in the name of damages, with a view to the discussion of the point, upon a motion for a new trial. The jury found accordingly, and it does not appear that the verdict was ever disturbed.

On bonds for the performance of covenants, or with condition other than for the payment of money, the recovery is

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usually limited strictly by the amount of the penalty. *State v. Ford*, 5 Blackf. 392; *Lawrence v. United States*, 2 *McLean* 581. But even in these cases, the American courts have repeatedly held that the penalty becomes forfeited upon the first breach, and if the damages be not then satisfied and they exceed the penalty, interest may be allowed upon the penalty from the time of the breach. *Carter v. Carter*, 4 *Day* 36; *Harris v. Clap*, 1 *Mass.* 308; *Hughes v. Wickliffe*, 11 *B. Monroe* 202; *Carter v. Thorn*, 18 *Ibid.* 613; *United States v. Arnold*, 1 *Gall.* 360. Or from the time the debt is demanded. *Warner v. Thurlo*, 15 *Mass.* 154; *State v. Wayman*, 2 *Gill. & John.* 254, 279; *Walcott v. Harris*, 1 *Rhode I.* 404.

In the recent case of *Brainard v. Jones*, 18 *New York Rep.* 35, it was held that the recovery against a *surety* in a bond for the payment of money is not limited to the penalty, but may exceed it, so far as necessary to include interest from the time of the breach. And the legal ground of the recovery is clearly stated by Mr. Justice Comstock in delivering the opinion of the court. "Whether," say the court, "a surety at the time of his default can be held beyond the penalty of his bond, is a question on the interpretation and effect of his contract. Whether interest can be computed after his default, where the effect will be thus to increase his liability, is a question of compensation for the breach of his contract." And it was held that, so far as interest is payable by the terms of the contract and until default made, it is limited by the penalty; but that after the breach, interest is recoverable, not on the ground of contract, but as damages which the law gives for its violation.

The question is in no wise affected by the provisions of our statute concerning obligations. *Nix. Dig.* 567. The 5th, 6th and 7th sections of the act, which are transcripts from *statutes 8 and 9, Will.* 3, apply only to bonds with condition "*other than for the payment of money.*" The 9th and 10th sections, which are substantially copies from *statutes 4 and 5 Ann.*, were designed to afford the relief against the

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penalty, which the obligor might previously have obtained in equity by paying the principal and interest due by the condition. He can neither, by the terms of the act, discharge the bond, nor plead the payment in bar, except by paying the full amount due for principal and interest according to the condition.

I think both upon principle and upon authority, the plaintiff, in an action upon a penal bond with condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty, in the shape of damages for the detention of the debt. This being the relief to which the plaintiff is entitled at law, it is clear that the complainant in *equity* is entitled to at least as full relief. The only difficulty, as we have seen, in the obligee's recovering in equity the full amount of principal and interest due upon the bond, has been that the plaintiff coming into equity to recover a legal demand, can recover no more than he would do at law. Independently, therefore, of all precedent or authority directly upon the question, I should hold that upon a bill in this court for the recovery of a bond debt, either upon the bond itself or a mortgage given to secure the bond, the complainant may recover the full amount of principal and interest due upon the bond, though it exceed the amount of the penalty. And this, upon the ground that it is a debt justly due, that it is in accordance with the intention of the parties, and that it violates no principle of law or equity. Equity will disregard the form in which the remedy is obtained and look alone to the substance of the transaction.

But whatever doubt may exist touching the right to recover either at law or in equity, beyond the penalty of the bond, where the claim is founded upon the bond itself, there is no difficulty in the way of a recovery of the full amount due for principal and interest where the suit is founded, not upon the bond, but upon a mortgage, or other security.

In *Clark v. Lord Abingdon*, 17 Vesey 106, the master of the rolls said: "In this case the creditor has two securities;

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one by bond, the other by mortgage. If he sues upon the former he cannot have interest beyond the penalty, but the mortgage is to secure payment not of the bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum is therefore secured by different instruments, by a penalty, and by a specific lien. The creditor may resort to either; and if he resorts to the mortgage, the penalty is out of the question. The mortgage is not for that." The master had disallowed the interest beyond the penalty; and it was urged by leading counsel in that case, as in this, that the bond was the principal and primary security. The mortgage being not a new contract, but merely secondary and collateral to the bond, could not enlarge the debt, or in any way affect the original rights. This view was not sustained. I confess it appears to me there is much force in this argument, if the penalty is to be regarded not as a mere security for performance, but as a sum certain, in the nature of stipulated damages, to be paid and received in lieu of performance of the condition of the bond.

The peculiarity of the view of the English courts of equity is this, that so long as the principal and interest of the debt is less than the penalty, the penalty is regarded strictly as such, and the sum actually due can alone be recovered; but that it fixes the utmost amount which the obligor agrees to pay for the violation of his contract, and therefore defines the limit, beyond which the obligee cannot enforce his claim. Looking at the question as a mere question of equity, it will be found very difficult to assign a satisfactory reason why the obligee should be permitted to recover a larger amount upon the mortgage, which is a mere security for the bond, than he is permitted to recover upon the bond itself.

In *Pitts v. Tilden*, 2 Mass. 118, the plaintiff moved for judgment, the amount of the principal and interest exceeding the penalty of the bond. The defendants opposed entering judgment for more than the penalty of the bond. The court said, this had never been questioned, except in case of a

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surety. It has been ruled so often in the case of the principal, that the point cannot now be brought into question. It rests on principles of law as well as of equity.

In *Baker v. Morris' Adm'r*, 10 *Leigh* 284, upon a bill exhibited in chancery for the recovery of a debt due upon bonds given by the defendant, the court decreed full interest upon the bonds exceeding the amount of the penalty.

In *Tazewell's Ex'r v. Saund'r's Ex'r*, 13 *Grattan* 354, it was decided by the Court of Appeals of Virginia, upon a full review of the authorities, that a court of equity will decree interest upon a bond or judgment, beyond the penalty.

This whole subject was fully considered and decided by Chancellor Walworth in *Mower v. Kip*, 6 *Paige* 88, where it was held that upon a money bond the obligor was both legally and equitably liable for the whole amount of the principal and interest secured by the condition of the bond, though it exceeded the amount of the penalty; and where such debt is secured by mortgage, the mortgagee has a lien upon the land for the whole amount of the principal and interest, according to the condition of the mortgage, though it exceeds the penalty of the bond.

In the somewhat later case of *Cruger v. Daniel*, 1 *McMullan's Eq.* 157, the Court of Appeals of South Carolina, after a very elaborate argument, decided upon the authority of the English cases, that a mortgagee in equity cannot recover beyond the penalty of the bond which the mortgage is given to secure. "In the language of the cases," say the court, "the penalty is the entire debt, and the mortgage is only intended to secure that, and refers to the bond. On what principle would you give more than the debt?" As to the principal debtor in a money bond, said Chancellor Walworth, in delivering his opinion in *Mower v. Kip*, "the amount secured by the condition of the bond is the real debt, which he is both legally and equitably bound to pay. And if he neglects to pay the money when it becomes due, there is no rule of justice or common sense which should excuse him from the payment of the whole amount of the principal

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and interest, whether it be more or less than the formal penalty of the bond." In this view I fully concur. For every other practical purpose, both at law and in equity, for more than two hundred years, the principal specified in the condition of the bond, with interest, has been regarded as the real debt, and the penalty the mere form by which the debt is secured. Why should it be regarded otherwise for the sole purpose of defeating the obligee of his just claim? It is resting in a mere technicality in utter disregard of the real nature of the transaction, the intention of the parties, and the ends of justice.

The exception should be overruled.

CHARLES P. STRATTON, receiver of the Camden Iron Manufacturing Company, *vs.* JOHN H. DIALOGUE.

1. Where real estate is *in fact* paid for with the funds of a company, there is clearly a *resulting trust* in favor of the company, although the deed therefor is made absolute to a third party, and purports upon its face to be for his own use and benefit.

2. A party so taking the title, becomes a *trustee* for the creditors and stockholders, and the trust will be enforced for their benefit at the instance of the receiver.

J. Wilson and Carpenter, for receiver.

Where one buys land in favor of another there is a resulting trust. *2 Story's Eq.*, § 1201.

Specific performance is not called for, but merely execution of *trust*.

Beasley, for defendant, cited *1 Lead. Cas. in Eq.* 274; *Lloyd v. Spillet*, 2 *Atk.* 150; *Smith v. Burnham*, 3 *Sumn.* 462; *2 Sugden on Vendors* (7th Am. ed.) 396; *Gilbert v. Trustees of East Newark*, 1 *Beas.* 180; *Morgan's heirs v. Morgan*, 2 *Wheat.* 290; *Fry on Spec. Perf.*, § 608; 7 *Cowen*

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551; *Angell & Ames on Corp.*, § 150; *Fry on Spec. Perf.*, § 314; *Trenton Mutual Life and Fire Ins. Co. v. McKelway*, 1 *Beas.* 133.

THE CHANCELLOR. The bill charges that while the Camden Iron Manufacturing Company were in operation in the year 1858, Henry Allen conveyed to John H. Dialogue, the defendant, sundry lots of land and real estate in the city of Camden, in trust for the company. That Dialogue claims title to the land as his own, and refuses to convey the land to the receiver or account for its value. That he has aliened a part of the land, and has exchanged portions of it with Charles Kaighn for other lands conveyed to him by Kaighn. The bill prays a discovery, an account of the moneys received for the sale of the land and for the rents and profits thereof, a discovery of the portion of the lands still held by the defendant, and a conveyance thereof to the complainant for the benefit of the creditors and stockholders of the company.

The answer admits the conveyance of the lands from Allen to the defendant, but alleges that it was in pursuance of a private contract between Allen and Dialogue, that it was not paid for by the company, nor held in trust for them.

The material question in the case is, whether the land was in fact paid for with the funds of the company. If it was, there is clearly a *resulting trust* in favor of the company, although the deed is made absolute to Dialogue, and purports upon its face to be for his own use and benefit. One of the deeds from Allen bears date on the sixteenth of April, and the other two on the twenty-second of May, eighteen hundred and fifty-eight. Cotemporaneously with the delivery of the title, there was received by Allen as a consideration for the conveyances, scrip for one hundred and forty-seven shares of the capital stock of the company, representing at its par value of \$100 per share, \$14,700. This scrip, as appears upon the stock book of the company and upon the face of the scrip itself, was an original issue of stock directly

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from the company to Allen, the grantor. Allen testifies that he was originally applied to by the president of the company to take stock. That he offered real estate in payment, a statement of which he furnished to be laid before the board, and he was afterwards informed that his offer was accepted. The offer was made in the name of the company. In all his negotiations he understood that he was dealing with the officers for the benefit of the company. His negotiations were with two of the directors, by whom, it is evident, the affairs of the company were exclusively managed, and who owned the great mass of the stock. He understood that he was receiving the stock from the company, not the stock of an individual; and he never heard it intimated that the land was claimed by Dialogue, until shortly before the company ceased operations. Charles Kaighn, who was a director and secretary of the company at the date of the transfer, testifies that the expediency of taking the houses and lots of Allen, in exchange for stock, was discussed by the directors. It was acquiesced in, as putting it in the power of the company to erect their works. It was understood that they could trade off the houses and lots to those who would do the work. They found it impossible to raise money to go on with the works. Easby and Dialogue both said we could get the works erected by trade in real estate, when parties would not take stock of the company in trade. One of the reasons assigned by Allen, why the deed was made to Dialogue, was that he was superintendent of the company's works, and could therefore more readily dispose of the lots in exchange for the labor of the workmen. Kaighn further testifies that the board agreed to take the property of Allen. "We congratulated each other in having a man of Allen's means in the board. As to Allen's taking Dialogue's stock, I never understood that at all. I understood that the exchange of land afterwards made by me with Dialogue for a part of these lots, and the conveyances I made to Dialogue, was for the benefit of the company. This matter of exchange was discussed between Easby, Dialogue and myself, who were then

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the only directors. I was secretary when the certificates of the stock of the company was issued to Henry Allen. I did not at that time know of other stock being surrendered up and cancelled. I supposed it to be an issue of new stock." The real estate was professedly dealt with by Allen as the property of the company. This appears both by his answer, and by the evidence. Franklin Eyre, who built a wharf for the company, testifies that Dialogue, as president of the company, and with whom he contracted, offered to pay him for the work in real estate. "He showed me," the witness says, "the lots, represented to me that the company got them of Allen, told me what the company paid Allen for it. To the best of my recollection, he said the company had paid Allen \$15,000 of stock. I am not certain as to the amount of the stock. I am pretty clear that Dialogue told me they had given Allen stock for the company." Easby himself, the president of the company, and the witness relied upon to support the averment of the answer, that Dialogue paid for the land with his own stock, testifies, that it was his understanding that Dialogue was to hold the property in trust for the company.

In support of the allegation that the stock issued to Allen was a re-issue of Dialogue's stock, four certificates of stock are exhibited, amounting together to 150 shares, which purport to have been issued to Dialogue on the eighth of July, 1856. These certificates are marked cancelled. Attached to them is a letter of attorney in blank, executed by Dialogue, authorizing the attorney to sell, assign and transfer unto Henry Allen, or any other person or persons, 147 shares in the capital stock of the company.

The answer to this evidence is, that the by-laws of the company require that transfers of stock shall be made upon the books of the company, in person, or by power of attorney, in presence of the president or secretary. No such transfer was ever made. The secretary swears that he never heard of any transfer of stock by Dialogue. There is no pretence that these certificates of Dialogue's were ever surrendered to the

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company. When they were cancelled does not appear. There is no evidence when the letter of attorney was executed, or that it was ever delivered to Allen. The evidence is express, that it was not delivered; that he never saw, or heard of it. How then can it be evidence of a transfer of stock? The whole transaction bears upon its face the strongest evidence of having been fraudulently manufactured. At any rate it is no evidence whatever of any transfer of stock.

There is written in the stock book, in the margin of the original certificates issued to Dialogue, the words, "transferred to Henry Allen, and certificate issued," without date or signature. Easby testifies that it was made by him at the time the stock was transferred to Allen, and that it was Dialogue's stock that was transferred. As has been said already, there was no transfer of Dialogue's stock, and this evidence is directly in the face of the evidence in the cause. There is no intimation of any such transaction upon the minutes of the company, or upon the face of the stock book, except what is furnished by Easby himself. The value of this evidence will be best understood by adverting briefly to the history of the company, and the attitude of Easby and Dialogue in regard to it.

The company was incorporated on the seventh of February, 1854, with a capital of \$100,000, divided into shares of \$100 each. In the year 1854, an attempt was made to organize the company by the corporators named in the charter. Subscription books were opened, subscriptions obtained, and a board of directors elected. It does not appear that one dollar was paid upon the subscriptions thus made. The evidence is, that there was not. We have the history of the organization of the company from the minutes, and from the lips of Easby himself. Before the company was formed, Easby and Dialogue had been in business together under the firm of Easby & Dialogue, carrying on machine business, manufacturing steam engines, boilers, &c. None of the stock was sold for cash. Both Dialogue and Easby paid for their stock in land and materials, under the provisions of the charter.

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The mode in which it was done, and the amount paid, appears from the minutes of a meeting of the directors held on the sixteenth of July, 1855. There were five directors, one of whom appears never to have acted. Three were present at the meeting, William Easby, John H. Dialogue and P. C. Brinck. Brinck purports, upon the books of the company, to have subsequently held one share of stock. At the date of the meeting, it does not appear that he had any interest whatever in the company. The following proceedings of that meeting are recorded:

"A schedule of property, consisting of machinery, tools, fixtures, stock, engines, boilers, patent right for Babbett metal, &c.; also, good will of the business of Easby & Dialogue as per inventory, amounting to \$54,000, was presented to the board, and accepted as stock, materials, property, &c.," as per section nine of the charter of the company. Also, the lot of ground and buildings situate southwest corner of Second street and Stevens street, city of Camden, N. J., at a valuation of \$16,000, was also accepted. The above amounts, say \$54,000 and \$16,000, were in payment for subscriptions to the capital stock of this, the Camden Iron Manufacturing Company.

The secretary was directed to have the deed for the above named real estate, conveyed by William Easby and wife, recorded; also, to have an affidavit by two or more directors made and filed with the secretary of state, in accordance with section third of the charter, which requires that whenever \$100,000 shall have been subscribed and at least \$50,000 paid in, and an affidavit thereof made by two directors, and filed in the office of secretary of state, it shall be lawful for the said corporation to commence and carry on its business under the provisions of the act.

At this time it is clear that Easby and Dialogue were the sole owners of the concern. They simply turned over their land, machinery, patent right, and good will of the business to the company, at a valuation accepted by themselves, and remained, as before, the owners of the concern. As yet no certificate of stock appears to have been issued.

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In the year 1856, Charles Kaighn's property at Kaighn's Point was purchased, and he became a stockholder and director. The mode in which he became a stockholder is worth noting, as it may tend to throw light upon the transaction with Allen. On the third of March, 1856, at a meeting of the directors, at which three were present, of whom Easby and Dialogue were two, the president, Easby, reported that he could purchase the Kaighn's Point property for \$10,500; \$8000 in cash, and \$2500 in the stock of the company at par. On motion of Dialogue, the report was referred to the stockholders for action. At a special meeting of the stockholders, held on the thirtieth of April, the president, Easby, reported that the property could be purchased for \$2000 in cash and \$6000 in the stock of the company, provided the company put improvements on it to the value of \$10,000 within three years; when, on motion of Dialogue, it was resolved that the report of the president be accepted, and that he be authorized to conclude the purchase upon the terms stated in the report, and have the deed made and executed to the Camden Iron Manufacturing Company forthwith. On the next day, the first of May, certificates for sixty shares of stock, which at par would be equal to \$6000, were issued to, and received by Kaighn. But no deed appears to have been executed in pursuance of the instructions of the stockholders. Easby appears to have taken the title to himself. At a meeting of the directors on the third of April, 1858, at which were present Easby, Dialogue and Kaighn, it was resolved that William Easby be requested to state upon what terms he will convey to the company the property at Kaighn's Point. At a meeting on the twenty-second of May, the same three directors being present, it was resolved that "a special meeting of the stockholders be called to take into consideration the purchase of the wharf property at Kaighn's Point, and the erection of the works thereon." On the first of June, 1858, the stockholders meeting was held, to take into consideration the purchase of the Kaighn's Point property. Kaighn, Dialogue and Easby were present.

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Kaighn was president, Dialogue secretary, and we know that Easby was present, for the minutes gravely state that stockholders were present, representing 600 shares of stock. Easby, at that time, we know, held over 500 shares of the stock, and must therefore have been one.

It was resolved that the board of directors be authorized and empowered to purchase of William Easby, the wharf and property at Kaighn's Point, formerly belonging to Charles Kaighn, upon such terms as may be deemed by them for the best interests of the company. On the fifth of June, Easby presented his resignation as president and director. Dialogue was elected president, and Allen, a director in his place. At a meeting of the directors on the tenth of June, the president (Dialogue) produced to the board the unexecuted deed of Easby to the company for the property at Kaighn's Point, also the bond and mortgage proposed to be given to Easby, to secure \$20,000 of the *purchase money* thereof, as proposed, for execution and delivery: when, on motion, it was resolved that the president and secretary be authorized to accept said deed, when executed, and to execute and deliver said bond and mortgage. This is the same property which Easby was instructed to have conveyed directly from Kaighn to the company for \$8000, and for which, on the first of May, 1856, stock of the company to the amount of \$6000 was issued to Kaighn, so that the property stood the company in \$26,000.

It may be suggested that the conduct of Easby or of Dialogue, as directors, is not in issue, and that the facts alluded to may admit of denial or explanation. That is conceded. But these facts appear upon the face of the evidence, and they are material as showing by whom the stock of the company was owned, how, and for what purposes it was held and transferred. They are material moreover, as directly confirmatory of other evidence in the cause. They show that Easby and Dialogue were partners in the iron manufacturing business, when the charter of this iron manufacturing company was obtained. That they turned over to the company at a valuation of \$70,000, all their land, machinery and other

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partnership property, including patent rights and the good will of their business, in payment for subscriptions to the capital stock of the company. That they continued in the control of the company from that hour until after the transfer of stock to Allen. That no stock was issued to any one until May first, 1856, after the purchase of the Kaighn's Point property, when 60 shares were issued to Charles Kaighn. On the twentieth of December, 1856, forty additional shares were issued to Kaighn. There were also issued during the same period, between the first of May and the thirty-first of December, 1856, 500 shares, just one half of the whole stock, to Easby, and 220 shares to Dialogue. So that on the thirty-first of December, 1856, there had been issued to Easby and Dialogue, the original proprietors of the property, 720 shares, which was twenty shares more than they paid for by the transfer of their property, and 100 shares to Kaighn in the purchase of his land. There were also certificates for 50 shares of stock issued to Easby on the thirty-first of December, 1856, which are stated, under Easby's receipt, to have been a dividend declared by the company for 1855. I do not find that any such dividend was declared. It does not, I think, appear upon the minutes of the directors. Easby, however, says it was made and recorded in the book of the company. It was a ten per cent. dividend. It was supposed at the time, that that dividend was made out of the profits of the company's business during that time, but it was afterwards discovered not to be so. It was a mistake of the secretary. Laying, therefore, this certificate out of the question, there were but 800 shares properly issued, when Allen conveyed his land to the company. The issue of the stock to Allen was not, therefore, an over issue of stock, but was stock belonging to the company as such, which had never been issued, and which was lawfully issued to Allen by the company.

So far as appears by the evidence, there has not been a share of this stock purchased and paid for after the organization of the company, except by Kaighn in 1856, and by Allen in

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1858. They both received their stock directly from and in the name of the company. They both transferred their land for the benefit of the company. And yet, upon some pretext, the whole of Kaighn's land passes into the hands of Easby, one of the copartners in the original concern, and the president of the company; and the whole land conveyed by Allen passes into the hands of Dialogue, the other copartner, also a director of the company. The evidence shows, unequivocally, in the case of Dialogue, that the land was purchased with the funds of the company, and that he holds it in trust for the creditors and stockholders of the corporation. It will be decreed accordingly.

I think there is nothing in the objection that the company could not take the land in payment for the stock of the company. Clearly, the land having been paid for by the funds of the company and conveyed to Dialogue, he becomes a trustee for the creditors and stockholders. The trust will be enforced for their benefit.

PHILIP GARISS vs. ELIAS L. GARISS and ISAIAH GARISS.*

1. The enforcement of the specific performance of a contract is an exercise of the extraordinary jurisdiction of the court, resting in *sound discretion*.
 2. Specific performance will not be decreed, where the party seeking it has been guilty of *laches*, or negligent in his application.
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On final hearing.

Hamilton, for complainant.

McCarter, for defendants.

* 2 Beasley 320.

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THE CHANCELLOR. By the terms of the contract upon which the bill is founded, the time for its performance expired on the first of April, 1854. There was neither a payment, nor a tender of the purchase money by the complainant, according to the terms of the agreement. But the bill alleges that the time for performance was extended by a parol agreement between the parties; that under this agreement the complainant made valuable improvements on the premises, and continued in peaceable possession until 1859, when the defendant, Elias L. Gariss, conveyed to Isaiah Gariss, who took title with notice of the complainant's equity. The defendants, by their answers, expressly denied these allegations of the bill, and the injunction which had been issued to restrain the defendants from disturbing the complainant's possession, was dissolved on the ground that the equity of the bill was fully denied by the answers.

The case made by the bill is not sustained by the evidence. The parties to the contract are father and son. In December, 1850, the real estate of Philip Gariss, the father, was sold under execution by the sheriff of Sussex, and purchased by Elias L. Gariss, the son, for \$1101. The land conveyed by the sheriff consisted of two tracts; the one containing about twenty-one and a half acres, and the other nearly twenty-five acres. Four hundred dollars of the purchase money were realized by the resale of the twenty-one acre lot. Three hundred dollars were advanced by the son. About fifteen acres of the twenty-five acre lot were reconveyed by the son to the father, Philip Gariss, and his wife. The balance, something less than ten acres, was retained by the son, as security for the advance made by him upon the purchase at the sheriff's sale. On the ninth of April, 1851, the parties entered into an agreement, by which it was stipulated that, upon the payment of the \$300 advanced by the son, on the first of April, 1854, with interest, the ten acre lot should be reconveyed by the son to the father. This is the agreement, the specific performance of which is now sought to be enforced.

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The contract was doubtless made for the father's benefit, to afford him an opportunity of redeeming the land by paying the amount advanced by the son. I see no reason to doubt that the arrangement was carried out by the son in entire good faith. It is shown that the father was permitted to remain upon the land, and was from year to year offered the privilege of redeeming it until the spring of 1859, when he was distinctly notified by the son, that the same would be sold unless he paid the amount due. During this period the father neither paid, nor offered to pay, any part of the principal. He utterly failed to fulfil the contract upon his part. He continued in possession, with the assent of the son, but whether under the terms of the contract to purchase, or as a tenant paying rent, is not very clear from the evidence. Nor do I deem it at all material to the result of the case. If he continued in possession as a tenant, the contract to purchase was determined, and there can be no ground for the complainant's claim. But assuming that the complainant continued in possession until 1859 under the contract to purchase, the time for performance having been from year to year extended by the son, there is no pretence that it was extended indefinitely, nor is there any satisfactory evidence that it was extended beyond the first of April, 1859. The allegation of the bill is, that relying upon the assent of the defendant to the extension of the time for performance, the complainant made improvements on the premises by the erection of a building. This is denied by the answer, and clearly disproved by the evidence. The evidence shows an entire willingness on the part of the son that the father should take the property, upon the payment of the money advanced, according to the contract, for years after the time limited for performance had expired, and great forbearance in enforcing his legal rights. This forbearance was exercised long after there seemed any reasonable ground for hope that the father would ever be able, or willing, to fulfil his contract. He was largely in arrear for interest upon the purchase money, or for rent, when the son announced his purpose to sell the

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property. The fact that the son sold a part of the land in 1854, very soon after the expiration of the time for performance limited by the contract, and that the purchaser took, and has ever since held possession, with the knowledge of the father, is strong confirmatory evidence of the view of the transaction presented by the defendants answer, and that the contract to purchase was then in fact determined.

But even if the contract continued, and if the defendant, by a course of conduct inconsistent with the intention of insisting upon all objections grounded on the lapse of time, be deemed to have waived all objections on this ground, the complainant is not entitled to relief. I think the evidence clearly shows that the vendor announced a clear purpose of terminating the contract on the first of April, 1859. It is clearly shown that in July, 1859, Elias L. Gariss entered into a contract for the sale of the property to a third party. Written notice of the contract was immediately given to the complainant. The deed, in pursuance of this contract, was delivered in December, 1859. The purchaser went into possession under the deed, fenced the premises, and, with the exception of some opposition made by the complainant at the time of his taking possession, without any objection from the complainant. In April, 1860, for the first time, the complainant tendered the purchase money and paid the arrears of interest due to the vendor. The acceptance of the purchase money was refused, on the ground that the premises had been sold and conveyed. The bill to enforce the specific performance of the contract was not filed till the tenth of May, 1861, more than two years after the complainant had been distinctly notified that the property would be sold, and nearly two years after the contract for sale had been made with a third party and the purchaser put into possession.

Enforcing the specific performance of a contract is an exercise of the extraordinary jurisdiction of the court, resting in sound discretion. *Alley v. Deschamps*, 13 Vesey 225; *Moore v. Blake*, 1 Ball & Beat. 62.

The relief will not be granted unless the party seeking it

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is prompt in his application, or shows good reason for the delay. *Marquis of Hertford v. Boore*, 5 Vesey 719; *Milward v. Earl of Thanet*, *Ibid.* 720, note b; *Eads v. Williams*, 4 *De Gex M. & Gor.* 691; *Fry on Spec. Perf.*, § 732.

Here the complainant stood passively by, two years after he had been distinctly notified that the premises would be sold, and more than eighteen months after a sale had actually been made, and the purchaser had entered into possession, without taking any step to enforce his contract, or showing any satisfactory reason for the delay.

The bill must be dismissed with costs.

ISRAEL J. WOODWARD, administrator of Forman Woodward, deceased, vs. EDWARD B. WOODWARD and ROBERT WOODWARD, executors of Robert E. Woodward, deceased, who was the surviving executor of Israel Woodward, deceased.

Israel Woodward, by his will, gave and bequeathed as follows: "I give and bequeath to my daughter, Elizabeth Black, the sum of fourteen hundred dollars, which sum I order my executors to put out at interest, and take land security for the same, and pay her the yearly interest arising thereon during her natural life; and if she dies leaving no lawful issue, I order the said sum of fourteen hundred dollars to be divided between my sons and daughters equally." He died leaving seven children, beside the said legatee. Shortly after his death, six of the seven children signed the following instrument: "Whereas, our father, Israel Woodward, in his last will and testament, has bequeathed unto his daughter, Elizabeth W. Black, the interest of \$1400 during her natural life, but not to receive any part of the principal. Now be it remembered, that we, the subscribers, legatees of the said Israel Woodward, do hereby agree that the said sum of \$1400 shall be paid to her by the executors of said will, at the time of the decease of Edward Black, her present husband; but in case the said Elizabeth W. Black should depart this life before the said Edward Black, then this agreement to be void and of no effect." *Held*—

1. The gift over was valid. As applied to *personal estate*, such limitation over imports not an indefinite, but a *definite* failure of issue.
2. By the terms of the gift, Elizabeth Black took the entire interest of the testator, defeasible on her leaving no issue at her death.

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3. The sons and daughters of the testator, living at his death, took a vested interest in the residuary gift, defeasible upon the death of the legatee for life, leaving issue.

4. The interest of the residuary legatees vested not in possession, but in right, upon the testator's death, so as to be transmissible to their personal representatives.

5. The limitation over is to all the sons and daughters of the testator, and the interest of either of such legatees is not defeated by his or her death before the legatee for life, but is transmitted to his personal representatives.

6. The defeasible interest of the legatees in the legacies over, upon the death of the legatee for life, was assignable.

7. The omission of one of the legatees to sign the agreement, will not invalidate it as against those who did sign it, they having derived all the benefit sought by the arrangement, and having incurred no additional burden or loss.

Beasley, for complainant.

The limitation over would create an estate tail in *real* estate. The word "survivors" is not used. Only expression is leaving. *Den v. Allaire, Spencer* 6; *Morehouse v. Cotheal*, 1 *Zab.* 480; *Den v. Howell, Spencer* 411; *Den v. Schenck*, 3 *Halst. R.* 29.

"Leaving," as applied to personal estate, imputes a definite failure of issue. 2 *Jarman on Wills*, 419, and cases cited.

The interest of the legatees over was vested and transmissible, although contingent. 1 *Williams on Ex'rs* 795; *Barnes v. Allen*, 1 *Bro. Ch. R.* 167.

It was assignable. 2 *Story's Eq. Jur.*, § 1040.

A family compromise to avoid litigation was a sufficient consideration for the assignment.

It will be sustained in equity even without consideration, because it is executed. *Bunn v. Winthrop*, 1 *Johns. Ch. R.* 335; *Hayes v. Kershaw*, 1 *Sandf. Ch. R.* 258; 1 *Lead. Cases in Equity* 234, and cases there cited.

The agreement not having been executed by one of the children, his share is untouched. 1 *Dutcher* 302.

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Vroom, for defendant.

The interest in the legacy under the will, independent of the release, upon the death of Elizabeth Black without issue, vested in the children of the testator at his death, and went to their issue.

The release was not an absolute sale or transfer of the right of the legatees. It was a voluntary arrangement; attempted, but never completed.

It was intended to be a *joint* agreement, not to be taken in parts. If all did not agree, there was no agreement.

The agreement was never carried into effect at all.

It was void as to Mrs. Hewlings, being signed by her alone. Her husband being a witness, did not bind her right.

THE CHANCELLOR. Israel Woodward, of the county of Monmouth, by his will, bearing date on the third day of January, 1821, gave and bequeathed, among other things, as follows, *viz.* "I give and bequeath to my daughter, Elizabeth Black, the sum of fourteen hundred dollars, which sum I order my executors to put out at interest and take land security for the same, and pay her the yearly interest arising thereon during her natural life; and if she dies, leaving no lawful issue, I order the said sum of fourteen hundred dollars to be divided between my sons and daughters, equally."

The testator died on the fifteenth of January, 1821, leaving his said will unrevoked, and leaving him surviving seven sons and daughters, beside the said Elizabeth Black. On the twenty-second of the same month of January, seven days after the death of the testator, an instrument of the following tenor was signed by six of the seven legatees of the reversionary interest, *viz.*

"Whereas our father, Israel Woodward, in his last will and testament, has bequeathed unto his daughter, Elizabeth W. Black, the interest of fourteen hundred dollars during her natural life, but not to receive any part of the principal. Now be it remembered, that we the subscribers, legatees of the said Israel Woodward, do hereby agree that the said

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sum of fourteen hundred dollars shall be paid to her by the executors of said will, at the time of the decease of Edward Black, her present husband; but in case the said Elizabeth W. Black should depart this life before the said Edward Black, then this agreement to be void and of no effect."

This agreement was not signed by Forman Woodward, one of the sons. Anna Hewlings, one of the daughters, at the time of executing the agreement, was a married woman. Her husband did not join in the execution of the instrument, but it was executed in his presence, and attested by him as a subscribing witness.

The bill is filed with the view of having the rights of the parties settled, and their respective claims amicably adjusted.

1. The gift over to the sons and daughters of the testator, upon the death of his daughter Elizabeth, "leaving no issue," was valid. A limitation over of real estate upon the death of the first devisee, leaving no issue, would create an estate tail. But as applied to personal estate, such limitation over imports not an indefinite, but a definite failure of issue, and the limitation over is good. *2 Jarman 419, and cases there cited.*

By the terms of the gift, Elizabeth Black took the entire interest of the testator, defeasible on her leaving no issue at her death.

2. The limitation over is to the sons and daughters of the testator. It is to be divided equally between them upon the death of the legatee for life. By the terms of the limitation over, the sons and daughters of the testator, living at his death, took a vested interest in the residuary gift, defeasible upon the death of the legatee for life, leaving issue. The interest of the residuary legatee vested, not in possession, but in *right*, upon the testator's death, so as to be transmissible to his personal representatives. *1 Williams on Ex'rs 757-9.*

The limitation over of the gift, is not to the surviving sons and daughters of the testator, nor to such of them as shall

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survive the legatee for life. Nor is there any expression in the will indicating the intention of the testator to limit the gift, to those only of his sons and daughters who should survive the legatee for life. It seems very clear from the terms of the gift, that the limitation over is to all the sons and daughters of the testator, and the interest of either of such legatees is not defeated by his or her death before the legatee for life, but is transmitted to his personal representatives.

3. The defeasible interest of the legatees in the legacies over upon the death of the legatee for life, was assignable. *2 Story's Eq. Jur.*, § 1040.

The real question in the cause arises upon the validity and effect of the agreement entered into by a part of the legatees of the residuary interest with the legatee for life, upon the death of the testator. It is urged that it was in the contemplation of the parties to the agreement, that all the legatees should sign it, or that it should not be binding upon any. The bill charges, and the answer does not deny, that Elizabeth Black was dissatisfied with the limitation over of her legacy to her brothers and sisters upon her dying without issue, and threatened litigation in regard to the will; and that the legatees of the reversionary interest, with the exception of Forman Woodward, to reconcile the said Elizabeth, to avoid litigation, and by way of family compromise, signed the agreement. If the compromise was effected and the litigation avoided by the execution of the agreement by only a part of the legatees, it is not perceived why the assignment should not be binding upon such as did sign it. They derived all the benefit from the arrangement which they could have done, had it been signed by all the legatees. No additional burden, loss, or inconvenience was imposed upon them by the omission of a part to sign. Having authorized the executor to pay over the \$1400 to Elizabeth Black upon the decease of her husband, no one of the parties signing the agreement could have held the executors liable for paying over the money in pursuance of such authority. And although the instrument was inoperative as to the interest of

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the other legatee, it was valid against the parties to the agreement, to the extent of their respective interests. The consideration of the agreement was the avoiding of litigation and the effecting of a family compromise. Those ends were attained as fully as if the agreement had been signed by every legatee. There was a sufficient consideration for the agreement, and it will be supported in equity. *Bunn v. Winthrop*, 1 Johns. Ch. R. 329; *Hayes v. Kershaw*, 1 Sandf. Ch. R. 261; 1 *Leading Cases in Eq.* 234.

But it is urged that the agreement was never carried into effect. That, although the husband of Elizabeth Black died many years before her death, the principal of the legacy was never demanded by or paid to her, but remained in the hands of the executors, she receiving interest upon it till her death. On the other hand, it does not appear that any one of the parties by whom the instrument was executed, ever questioned its binding effect or objected to the payment of the money by the executors, pursuant to the agreement. They are all deceased, without having at any time pretended to have any claim to, or interest in, the fund purporting to have been transferred by the agreement. The agreement remained unquestioned in the hands of the legatee for life. The fact that the principal of the legacy remained in the hands of the executors, the legatee for life receiving interest upon it, was in no wise inconsistent with her right to the principal, or with the recognition of that right by the executors. The executors could not pay over the whole fund, for a part of it had not been assigned. It may have been for the interest and convenience of both parties that it should remain in their hands.

The complainant is entitled to the relief prayed. As executor of Elizabeth Black, he is entitled to six-sevenths of the legacy of fourteen hundred dollars bequeathed by the will of the testator, and as the administrator of Forman Woodward, to the remaining one-seventh of the said legacy, with the arrears of interest on the said shares respectively. Just allowance must be made to the executors for their care of the fund, and for their costs and expenses.

Tappan's ex'r v. Ricamio et al.

AUGUSTUS W. CUTLER, executor of Abraham Tappan, deceased, *vs.* JOHN A. RICAMIO, LOTT PRUDDEN and others.

1. Where a mortgage is given to secure a trust fund belonging to the mortgagor, as between himself and the holder of a second mortgage given by him, he can have no claim in equity to the fund, until the second mortgage is satisfied.

2. It is within the power of a court of equity to protect the interests of legatees in remainder, during the life of the tenant for life; and the power will be exercised, not only in behalf of the legatee, but also of his assignee, or of any other person legally entitled to the fund, upon the determination of the estate for life.

3. If a trust fund is in danger of being diverted to the injury of any claimant having a present or future fixed title thereto, the administration of the fund will be duly secured by the court, in such manner as the court may in its discretion, under all the circumstances, deem best fitted to the end.

Samuel Guerin, by will, gave \$600 to his executor, the interest and profits thereof to be paid to his daughter, Eunice Brown, during her life, and at her death the principal to be paid to her four children. Abraham Tappan, the executor of Guerin, paid the principal to the children, with which they purchased of Prudden a house and lot for \$850. They agreed to pay \$600 in cash, giving their bond and mortgage to Tappan for \$625, as security for the fund, and gave Prudden a second mortgage for \$250. The property was purchased to make a home for Mrs. Brown. She accepted it in lieu of the annuity. Tappan died in 1859, and appointed A. W. Cutler his executor.

The bill was filed by Cutler to foreclose the mortgage. Prudden filed a cross bill, praying that the original bill be dismissed, or that the premises be sold to pay encumbrances in order of priority. Prudden alone answered original bill. The executor alone answered cross bill. A decree *pro confesso* was taken as to the other defendants.

Cutler, pro se.

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Pitney, for Prudden, one of the defendants.

The original bill should be dismissed, or proceedings stayed until further order of court.

The mortgage which the complainant seeks to foreclose was given to the trustee of the mortgagors. Trustee is under the control of the court.

The effect of the proceeding is to injure Prudden. He should be decreed to have a lien on the fund in the hands of the executor.

THE CHANCELLOR. There is no controversy as to the order of priority of the mortgages, nor as to the material facts upon which the rights of the respective parties depend.

As between the executor of Tappan and Prudden, it is not denied that the complainant's mortgage is entitled to priority. But it appears by the cross bill, which is taken as confessed, that the fund which that mortgage was given to secure, belongs to the estate of Samuel Guerin, deceased, of which Abraham Tappan was executor. That by the will of said Guerin, the interest and profits of the fund were bequeathed to his daughter, Eunice Brown, for her life, and on her death, equally to her four children, share and share alike. The children took a vested interest in the legacy on the death of the testator.

In November, 1856, Eunice Brown and her four children, the legatees under the will of Samuel Guerin, being desirous of vesting the legacy thus bequeathed to them in the purchase of a house and lot owned by Prudden, as a home for the mother during her life, purchased the mortgaged premises of Prudden for \$850. The title was made to the children. Six hundred and twenty-five dollars, the amount of the fund in question, was furnished by the executor, and for that amount the children gave a mortgage to the executor of Guerin to secure the interest of their mother in the fund. Two hundred and twenty-five dollars, the balance of the purchase money, was secured by a mortgage on the premises from the children to Prudden. The whole purchase money was thus secured on the premises; Prudden's mortgage being

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last in order. His security was found in the fact that the prior mortgage, although upon its face an absolute mortgage in the ordinary form to secure the sum of \$625 to the executor, yet in truth was merely intended to secure the rights of the legatee for life. On her death, the principal of the fund belonged to the mortgagors. As between them and Prudden, of whom they purchased, they can have no claim in equity to the fund, until the mortgage given by them to secure the purchase money of the mortgaged premises is satisfied.

If the mother were now dead, the fund would belong absolutely to the mortgagors, who are the legatees in remainder. If the purpose of the mortgage had been expressed upon its face, or if it had been given in terms to secure the annual interest of the fund to the widow for her life, and on her death to pay the principal to the mortgagors, the right and equity of the second mortgagee would be apparent. Independent of the legal rights of the executor, such is the real design and effect of the mortgage. He is a mere trustee to carry into effect the provisions of the will. It is clear that the mortgagors can have no title to this fund as against Prudden, their mortgagee. A mortgagor of premises, who himself held a mortgage thereon at the time he mortgaged his interest in the premises to another, cannot set up such prior mortgage, or any interest he has acquired under the same, against his own mortgagee, or any person claiming under him. *Williams v. Thorn*, 11 *Paige* 464.

There is no doubt of the power and duty of a court of equity to protect the interests of legatees in remainder during the life of the tenant for life. The cases cited by the complainant's counsel fully sustain the principle, and designate the mode in which the power will be exercised. *Johnson v. Mills*, 1 *Vesey, sen.*, 282; *Hallet v. Thompson*, 5 *Paige* 583; *Craig v. Hone*, 2 *Edwards' Ch. R.* 554; 1 *Story's Eq.*, § 603; 2 *Ibid.*, § 826-7, 845-6, 851.

And the power will be exercised, not only for the protection of the legatee, but of his assignee, or any person legally entitled to the fund, upon the determination of the estate for

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life. In *Johnson v. Mills*, 1 *Vesey, sen.*, 282, Lord Chancellor Hardwicke said: "I thought nothing was better settled than that, wherever a demand was made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor to have it secured for his benefit and set apart in the meantime, that he might not be obliged to pursue these assets through several hands. Nor is there any more useful part of the jurisdiction of the court in the administration of assets. Therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so as that it might fall into the bulk of the estate; and this is done to secure every party of course as a common equity, without expecting any suggestion of the insolvency of the executor, or of wasting the assets."

If property in the hands of a trustee for certain specific uses or trusts (either express or implied), is in danger of being diverted to the injury of any claimant having a present or future fixed title thereto, the administration of the fund will be duly secured by the court in such manner as the court may, in its discretion under all the circumstances, deem best fitted to the end; as by the appointment of a receiver, or by payment of the fund, if pecuniary, into court, or by requiring security for its due preservation and appropriation. 2 *Story's Eq.*, § 826, 827.

If the tenant for life were now dead, the proper decree would be, after satisfying any claim that the executor might have upon the fund for administering the same, to pay out of the proceeds of the sale of the mortgaged premises, first, the claim of Prudden, and the balance, if any, to the mortgagors. During her life, it is necessary that the principal of the fund should be secured in such manner as to enable the executor to execute the trust by paying her the interest as it accrues. This may be done, either, 1st, by directing a sale of the premises, subject to the annuity of the legatee for life; or, 2nd, by directing the proceeds of the sale to be applied to satisfy the mortgages in the order of their priority,

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and retaining the fund belonging to the estate of Guerin under the control of the court, to be applied in satisfaction of the equitable claims of the respective parties. The first form of decree will occasion less expense and hazard to the parties, and will probably be most free from objection. A reference will be necessary to ascertain the amount due upon the respective mortgages. Upon the coming in of the report, a decree will be made in such form as counsel may settle as most advantageous, under the circumstances, for the parties interested.

Whatever form of decree may be adopted, the rights of the legatee for life must be adequately secured. She is before the court, and it is the duty of the court to see that her interests, so far as they may be incidentally affected, should be carefully guarded.

ELIZABETH VANDUYNE vs. ALFRED VANDUYNE and others.

1. Whether the execution commands the sheriff to sell *so much* of the premises as may be necessary to satisfy the decree, or to raise the *sum required* out of the premises, the duty imposed upon him, as to the quantity of land to be sold, is the same. His duty, in either event, is to sell only *so much* of the premises as may be necessary to satisfy the requirements of the execution, provided such portion can be conveniently and reasonably detached from the residue of the property.
 2. A mere error of judgment, or mistaken exercise of discretion, by the sheriff, in the absence of fraud or unfairness in the sale, affords no ground for the interference of the court.
 3. A judicial sale will not be interfered with, when the party seeking relief has been guilty of *laches* in the pursuit of his remedy.
 4. Motion denied without costs, the applicant acting in behalf of minors.
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On petition to set aside a sheriff's sale.

Vanatta, for the petitioner.

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Runyon, for purchaser, contra, cited *Parkhurst v. Cory*, 3 Stockt. 234.

THE CHANCELLOR. The defendant applies to set aside a sale of real estate, made by the sheriff of the county of Morris, by virtue of an execution issued out of this court.

1. The first ground relied upon is, that the sheriff, by virtue of the execution, was required and authorized to sell only *so much* of the premises as was necessary to satisfy the amount due upon the execution: whereas, he sold the whole premises for a sum far exceeding that amount.

Where the execution commands the sheriff to sell *so much* of the premises as may be necessary to satisfy the decree, it imposes no different duty upon the officer as to the quantity of land to be sold, than if it had commanded him to raise the sum required out of the premises. His duty, in either event, is to sell only so much of the premises as may be necessary to satisfy the requirement of the execution, provided such portion can be conveniently and reasonably detached from the residue of the property. *Tiernan v. Wilson*, 6 Johns. Ch. R. 414; *Mervin v. Smith*, 1 Green's Ch. R. 196; *Coxe v. Halsted*, *Ibid.* 311; *Parkhurst v. Cory*, 3 Stockt. 233; *Groff v. Jones*, 6 Wend. 522.

2. It is urged that the execution might have been satisfied by the sale of a part of the premises, without prejudice to the remainder, and that the conduct of the sheriff in making sale of the whole premises, amounted to an abuse of trust. The premises to be sold consisted of a small farm of about thirty-eight and a half acres, and a timber lot of about eleven acres and a half, separate from the farm. On the day of sale, the defendant, Alfred Vanduyne, requested the sheriff to sell the wood lot and about eleven acres and three quarters of the farm land, leaving twenty-six acres and three quarters, upon which are all the buildings on the premises, unsold. The allegation of the defendant is, that the land thus requested to be sold in separate parcels would have brought more than sufficient to satisfy the execution,

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and that the land would have sold more advantageously in parcels than in the mode adopted by the sheriff. The allegation is not sustained by the evidence. It rests exclusively upon the *ex parte* affidavit of the defendant, Alfred Vanduyne, unsupported by the testimony of any other witness. He says that he would himself have given forty dollars per acre for the lots thus designated and requested to be sold, rather than that they should have been sold for less; and that other persons at the sale told him that they would have given forty dollars per acre for them if sold separately. He does not, however, state that he would pay that price upon a resale of the property, nor does he pretend that he, or that any other person at the sale, intimated to the sheriff his willingness to purchase at the price designated in his affidavit. The sheriff, on the other hand, states, that when the request was made to sell the land in parcels, the solicitor of the complainant objected, on the ground that a sale in that mode would be prejudicial to the interests of the complainant. That he thereupon adjourned the sale, and satisfied himself by examination and inquiry that the property would be injured by selling it in the mode proposed. That he thereupon sold the premises together, believing, as he still believes, that method of sale to be most for the interest of all parties interested therein. In confirmation of his views, the sheriff states that the part proposed to be separated from the farm was remote from the public road, with no means of access to it from the highway except over the other portion of the tract, which he properly supposed he had no authority to guaranty to the purchaser. I think the weight of the testimony is, that the sheriff exercised his discretion wisely, and that the premises were sold to the best advantage. But if the fact were otherwise, there is clearly no ground upon which this court can interfere with the discretion exercised by the sheriff in making the sale. There is no imputation upon his integrity, or against the fairness of the sale. It is difficult to resist the impression created by the evidence, that the application of the de-

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fendant was prompted rather from a desire to delay the sale, than from any well founded expectation that the interest of the parties interested would be promoted by a resale. There is another ground upon which this sale ought not to be interfered with. The sale was made on the twenty-sixth of January. The deed was to have been delivered on the ninth of February. No intimation was given at the time of sale that the sale would be contested. The defendant rested, without taking any step, until there was barely time to procure an order of the court to restrain the delivery of the deed. Meanwhile the purchaser was permitted to borrow money and make all his arrangements for the completion of the purchase. No notice was given him of any objection to the sale, until he appeared at the time and place designated to receive his title, when he was informed that the sheriff was restrained from delivering the deed. He is not then furnished with the evidence upon which his right to receive a title for the premises is resisted, nor is the evidence furnished until too late for the purchaser to prepare to resist the application on the day originally designated for the hearing. It is no excuse for this delay, that the defendants' counsel was from home. He might have been corresponded with, or other counsel procured.

The purchaser of these premises has acted in entire good faith. He had no connection with the parties, or with the subject matter of the controversy in the cause, but attended the sale for the purpose of purchasing a farm for his own occupation, after he had sold his own. He has made his arrangements to complete the purchase and take immediate possession of the farm. As a measure of public policy, it is of the utmost importance that a person thus purchasing at a sheriff's sale should not be drawn into controversy, or have his rights as a purchaser impugned for matters over which he has no control, and for which he is in no wise responsible, except upon the most cogent necessity for the protection of the rights of others. If purchasers at judicial sales come to understand that they purchase with the hazard of litigation,

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founded on an error of judgment or a mistaken exercise of discretion by the sheriff, it will unavoidably tend to deter persons from bidding, and operate detrimentally upon the rights of all parties interested.

A stronger case would have been presented for the interference of the court, if the complainant had had no interest in the premises after the satisfaction of the execution. But they are charged with her support and maintenance during life. Another year's annuity is already due. If a portion of the premises had been sold, as proposed by the defendant, and had proved sufficient to satisfy the amount due on the execution, the residue of the premises must have been again advertised, and the expense of another sale incurred to meet the accruing claims of the complainant. The complainant was interested, as well as the defendants, in having the sale made in the most advantageous manner. In every aspect of the case, I am satisfied that the sale was fairly made, in the manner most for the interest of all parties concerned.

The application must be denied, the rule to show cause be discharged, and the sheriff directed forthwith to deliver the deed to the purchaser on his complying with the terms of sale. As the defendant represents the interests of minors, the order is made without costs to either party as against the other.

WILLIAM L. JOHNSON and GEORGE G. JOHNSON, partners,
. &c., vs. REBECCA CUMMINS and GEORGE CUMMINS.

1. In the absence of any trust deed or settlement, defining and limiting the mode in which a separate estate shall be charged by the wife, equity will charge it, while she lives apart from her husband, with debts contracted by her for her own benefit, without any express appropriation by the wife, of the estate or any part of it, to the payment of the debt.

2. The separate estate of a married woman is subject in equity to the payment of debts contracted in reference to, and upon the faith and credit of the estate.

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3. Where a married woman lives apart from her husband, and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her *separate estate*, unless the contrary is shown.

4. It is no defence to a claim upon the separate estate of the wife, that the separate estate of the wife created by the statute (*N.Y. Dig.* 503, § 1,) is a *legal* estate, and that the enforcement of the claim in this aspect, is not properly within the cognizance of a court of equity.

5. The jurisdiction of a court of equity over the separate estate of a married woman rests not merely upon the ground that it is an equitable estate, but upon the ground that it is her *separate* estate, which is *equitably* subject to contracts and engagements entered into by her, which are not legally binding upon her personally, and which can not be enforced at law.

6. Nor is it material, whether the estate is vested in a trustee, the interest of the wife being merely equitable, or directly in her, so that she has both the legal and equitable interest.

7. The statute (act of 1852, for the better securing of the property of married women,) does not impair the right of the husband to an estate by courtesy in the separate property of the wife.

8. Nor, as it *seems*, does the act take away the husband's right to administer upon, and to take as his own, the personal property of the deceased wife, where she dies intestate.

The complainants' bill charges, that on the first of May, 1860, Rebecca Cummins was indebted to the complainants, who are engaged in mercantile business under the partnership name of W. L. & G. W. Johnson, in the sum of \$108.94, which indebtedness was contracted by the said Rebecca for merchandise sold and delivered to her, between the first of March, 1854, and the first of May, 1860, with interest thereon. The said Rebecca, in the year 1826, was married to George Cummins, and is still his wife, but for eight years last past she has been living separate from her husband. Prior to the first of April, 1851, she was possessed of considerable estate, of about the value of \$5000, as of her own *separate property*, and with such property about the first of April, 1851, she purchased a farm, containing one hundred and fourteen acres, for the sum of \$3438.30, and took a conveyance therefor, in the name of Henry Vreeland, in trust for herself. About the fifth of February, 1852, the said Vreeland executed under his hand and seal a declaration of trust, wherein

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he declared that the said lands were purchased with the separate property of the said Rebecca, and that he held the same under the said conveyance in trust for her, as her separate property. About the ninth of March, 1855, Vreeland, by the direction of the said Rebecca, conveyed his legal estate in the lands to John Green, and was discharged from his trusteeship. On the twenty-third of April, 1855, the said Rebecca, in her own name, without joining with her husband, she then being separated from him, conveyed her estate in the said lands to the said John Green, for the sum of \$4641.70, and received the said consideration money for her own separate use. About the twenty-fourth of November, 1855, Green conveyed the said land to Amos Swayze, for \$5000, and about the first of March, 1858, Swayze conveyed the land to the said Rebecca in her own name, her husband not being named in the deed, for the consideration of \$5350. The said Rebecca is still the owner of said land as her separate estate, which is worth the sum of \$5350, and encumbered only to the amount of \$350, by a mortgage given by the said Rebecca in her own name to one James K. Swayze.

Since the year 1851, the said Rebecca has, with her separate estate, always transacted business in her own name, and since her separation from her husband, she has conducted the farming business in her own name, and for her own separate use and benefit; buying, selling, and trafficking in her own name, giving bonds, mortgages, and promissory notes, as a feme sole, and transacting business generally as an unmarried woman. Since April 1st, 1858, she has lived upon, and carried on the business of the farm in her own name, and for her own separate use, and is possessed of considerable personal property upon the said farm, which she holds in her own name, with which the farm is worked and cultivated. The debt of the said Rebecca to the complainants was contracted for goods, clothing, flour, groceries, and other necessaries sold to her upon her own credit by complainants out of their store, and were such articles as were necessary for herself and family, and the business of the

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farm, and were purchased for the benefit of her separate estate, and were consumed and enjoyed by her in the maintenance and support of herself, and carrying on the farm for her own use and benefit, and were sold by the complainants to the said Rebecca entirely upon the credit of her separate estate, and solely upon the faith of her own responsibility.

Her husband, the said George Cummins, is now and has for some years been insolvent, and the owner of no property. For the last eight years he has not lived with his wife, nor exercised any control over her affairs, and the complainants' debt cannot be collected from him. On the first of May, 1860, the said Rebecca gave to the complainants her note, with her son, Morris G. Cummins, as security, whereby she promised to pay the said sum of \$108.94 to the complainants or bearer. At the time the said note was given, the said Morris G. Cummins resided with his mother, and still resides with her: he then was, and still is, a man of no property, and unable to pay the debt. The said note was not taken in satisfaction of the debt, or upon the responsibility of the said Morris, but upon the credit of the said Rebecca and her separate estate. On the seventeenth of July, 1862, the complainants instituted a suit at law for the collection of the said note, against the said Rebecca and Morris G. Cummins, to which the defendant filed her plea, alleging her coverture with the said George Cummins in bar of any recovery against her in the said suit, and alleging no other defence thereto; whereby the complainants were compelled to abandon their suit, and being without remedy at law, are compelled to resort to equity for relief.

The prayer of the bill is for a discovery touching the defendant's separate estate, that an account may be taken thereof, and of the complainants' debt with interest, and that the same may be charged upon the separate estate of the said Rebecca, and the payment thereof decreed to be made out of the said separate estate, and that a sale of so much thereof as may be necessary to satisfy the said debt, may be

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made by the decree, and under the direction of this court. To this bill there is a general demurrer for want of equity.

J. M. Robeson, for Rebecca Cummins, in support of the demurrer.

The demurrant is possessed of no separate estate. All the property she held at the time of filing the bill was real estate in fee, and personal estate held by herself as a feme sole, as *general* property, and not specially for her own use and benefit.

There is no case where the wife's *general* property has been held liable for her debts, while the husband was living.

The husband, at common law, was bound to take care of his wife and children.

As to the real estate, bill shows it is not *separate* estate. Nothing but the act of 1852 keeps the husband from the enjoyment of it. She could only divest herself of it by joining in a deed with her husband. That act does not convert the legal estate of the wife into an equitable estate.

Under the act of 24th March, 1862, (*Pamph. 271*) the complainant has adequate remedy at law. Prior to that act the wife could not have bound either herself or her husband, or charged the estate.

The bill does not set out the nature and character of the wife's estate with sufficient certainty.

Mr. Robeson cited 2 *Kent* 145; 4 *Ibid.* 202; *Leaycraft v. Hadden*, 3 *Green's Ch. R.* 512; *Young v. Paul*, 2 *Stockt.* 401.

Depue, for the complainants, contra.

As to remedy at law. The act of 1862 does not exclude jurisdiction of this court. It was intended to give concurrent jurisdiction to courts of law. Again, it was only intended to apply where parties are living together, not where living apart.

As to uncertainty of bill. It was not necessary to make more specific charges than we have done. *Wheaton v. Phillips*, 1 *Beas.* 221.

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There are two classes of authorities. In the first, the distinction is chiefly in regard to the evidence where the wife is living separate, and where with her husband. Where she is living separate, the intent to bind the estate will be *presumed* from the fact of contracting the debt. Where she is living with her husband, the intent must be *proved*. In the second class, the distinction lies in the character of the estate. Where lands are charged, it must be in writing; where personalty, it may be by parol.

The wife's separate estate will be bound by contracts which do not refer to, or mention it. *Hulme v. Tenant*, 1 *Bro. Ch. R.* 16.

Equity will enforce against the separate estate, those debts which it is equitable and just to enforce. *Johnson v. Gallagher*, 7 *Jur. N. S.* 273; 2 *Story's Eq. Jur.*, § 1401, a; *Coleman v. Wooley's Ex'r*, 10 *B. Mon.* 320.

As to relief. *Wheaton v. Phillips*, 1 *Beas.* 221; *Dicker-
man v. Abrahams*, 21 *Barb.* 551.

As to form of decree. *Stuart v. Kirkwall*, 3 *Mad.* 387; *Francis v. Wigzell*, 1 *Ibid.* 145; *Owens v. Dickenson*, 1 *Craig & Ph.* 48; *N. A. Coal Co. v. Dyett*, 7 *Paige Ch. R.* 1; *Gardner v. Gardner*, *Ibid.* 112; *Ewing v. Smith*, 3 *Dess.* 417.

Mr. Depue further cited 1 *White & Tudor's Lead. Cases* 333; *Murray v. Barlee*, 3 *Mylne & K.* 209; *Corbett v. Poel-
nitz*, 1 *T. R.* 5; *Bell on Husband and Wife* 513, 516, and cases there collected; *Bullpin v. Clark*, 17 *Vesey* 365; *Tullett v. Armstrong*, 4 *Beav.* 319; *Jarman v. Wilkerson*, 7 *B. Mon.* 293; *Curtis v. Engle*, 2 *Sandf. Ch. R.* 287; *Gardner v. Gardner*, 22 *Wend.* 526; *Colvin v. Currier*, 22 *Barb.* 387; *Billings v. Baker*, 28 *Barb.* 343.

THE CHANCELLOR. The design of the bill is to charge certain real estate in the possession and enjoyment of the wife, with a debt contracted by her for the benefit of the estate, and for the support of herself and her family while living separate from her husband.

It is urged, in support of the demurrer, that the wife had

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no separate property in the estate in question, but that it was subject to the marital rights of her husband. The clear allegation of the bill is that she was possessed, as of her own separate property, of an estate of about the value of \$5000, with a part of which she purchased the farm in question, and took a conveyance thereof in trust for herself; that the trustee, by a declaration of trust executed under his hand and seal, declared that the land was purchased with the separate property of the wife, and that he held the same under the said conveyance, in trust for her as her separate property. The bill further alleges, that the land was subsequently, and subsequent to the passage of the act of 1852, "for the better securing the property of married women," conveyed to the wife, the husband not being named in the deed; that the wife is still the owner of the said land as her separate estate; that since the first of April, 1858, soon after the title was conveyed to her, she has lived upon, and carried on the business of the farm in her own name, and for her own separate use; and that she is possessed of considerable personal property upon the said farm, which she holds in her own name, and with which the same is worked and cultivated.

The demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant and well pleaded, although it does not admit the conclusions of law drawn therefrom.

The objection of the demurrant is, that the estate originally conferred on the wife was not given for her sole and separate use, so as to defeat the marital rights of the husband; and that the vesting of the property by the wife for her separate use, without the concurrence of the husband, was illegal and void. But how is that to be decided, upon the present state of the pleadings, in the face of the averments contained in the bill and admitted by the demurrer? If the original gift of the estate to the wife was insufficient in law to defeat the marital rights of the husband, and the trust created for the use of the wife was without the consent

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or concurrence of the husband, and those facts are intended to be relied on as a defence to the complainants' claim, they should be distinctly averred in pleading.

This objection, it will be observed, is not raised by the *husband* for the protection of his rights. He was made a defendant to the suit, but permitted the bill as against himself to be taken as confessed. The wife, by leave of the court, defends alone. It is admitted that she has treated this property as her separate estate; that she has used, occupied, and enjoyed it as such; that she has gained credit upon the faith of her sole and separate ownership, and that the debt of the complainants was incurred for the benefit of that estate, and for her separate maintenance. Under such circumstances, the plea from the lips of the wife after a divorce from her husband, that the original creation of the separate estate was invalid, and that she had no title to the estate as against her husband, does not commend itself to the favorable consideration of a court of equity. If there be such defence, it should at least be distinctly averred and clearly proved.

For the purposes of the present inquiry, it must be assumed that the wife had a separate estate, which she might lawfully charge with debts created for the benefit of the estate, or for her own support and benefit.

In the absence of any trust deed or settlement, defining and limiting the mode in which the estate shall be charged by the wife, equity will charge the separate estate of the wife, while living apart from her husband, with debts contracted by her for her own benefit, or for the benefit of the estate, without any express appropriation by the wife, of the estate, or any part of it, to the payment of the debt.

The general principle is, that a married woman is enabled in equity to contract debts in regard to her separate estate, and that the estate will be subject in equity to the payment of such debts. In order to bind the separate estate, it must appear that the engagement was made in reference to, and upon the faith and credit of the estate. But where a mar-

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ried woman living apart from her husband, and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her separate estate, unless the contrary is shown. *Owens v. Dickenson*, 1 *Craig & Ph.* 48; 2 *Story's Eq. Jur.*, § 1401, § 1401 a; 1 *Lead. Cases in Eq.* 406.

The allegations of the bill bring the case within the well settled principles upon which equity administers relief in regard to the separate estates of married women.

The bill further alleges, that after the passage of the act of 1852 the estate was conveyed to the wife, and that since that time she has resided upon the estate, separate from her husband, and has carried on business in her own name and on her own account; and that during that period, for the purposes of the said estate, a part of this debt was created. To this part of the claim it is objected, that the separate estate of the wife created by the statute is a legal estate, and that the enforcement of the claim in this aspect is not the proper subject of the cognizance of a court of equity. This objection was directly met and overruled by the Chancellor in *Wheaton v. Phillips*, 1 *Beas.* 221.

The jurisdiction of a court of equity over the subject, does not rest upon the ground that the estate of the wife is an equitable estate merely, but upon the ground that it is her *separate* estate, which is equitably subject to contracts and engagements entered into by her, which are not legally binding upon her personally, and which cannot be enforced at law. Whether the estate of the wife is vested in a trustee, her interest being merely equitable, or whether the estate is vested directly in her, so that she has both the legal and equitable interest, is immaterial. By operation of the statute, she holds the land during her coverture as her separate estate, for her sole and separate use and benefit, free from the control, debts, or engagements of her husband, and exempt also from the claims of his creditors. It is as much chargeable in equity with her engagements as any other property which she may hold to her separate use. The statute has created an interest which before could only have been created

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by a declaration of trust; but the interest of the wife in relation to the property, and to the equitable claims of creditors against it, are not essentially different from those which subsist in relation to her separate estate, when created by settlement or deed of trust. It is declared by the statute to be her sole and separate property as if she were a feme sole. The only difference is, that being a feme covert, she cannot, as a feme sole, make a valid contract touching the property, which can be enforced at law. Equity, therefore, applies the remedy by appropriating the property to the satisfaction of the debt. Nor is the jurisdiction of equity over the subject, affected by the fact that the legislature has given concurrent jurisdiction to the courts of law. If, then, the complainant's case is within the operation of the act of March 24th, 1862, *Pamph. L.* 271, which may well be doubted, it cannot affect the jurisdiction of this court or the complainants' title to relief in equity.

A question was raised upon the argument, as to the extent of the wife's interest in the property that can be reached or affected by the decree of the court, under the case presented by the bill. The determination of that point is in no wise essential to the decision of the question now under consideration, but it is proper to state that an intimation of opinion then made by the court was not well founded.

The design of the statute, *Nix. Dig.* 503, § 3, as plainly evinced, was to protect the estate of the wife in lands granted to her during coverture, from the power of the husband, and from the claims of his creditors. It declares that she shall hold the property to her sole and separate use, and that it shall not be subject to the disposal of her husband, nor be liable for his debts. The language of the statute may have full effect without at all impairing the right of the husband to an estate by courtesy. The better opinion therefore is, that the estate remains in the husband unaffected by the statute. This is in accordance with the clearly expressed opinion of Mr. Justice Vredenburgh, and seems to be the necessary result of the opinion of the Chief Justice in *Naylor v. Field*, 5 *Dutcher* 287; *Ross v. Adams*, 4 *Dutcher* 160.

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A contrary opinion was held upon the construction of a statute of the state of New York, nearly identical with our own, in *Billings v. Baker*, 28 Barb. 343. But the decided weight of authority in that state is adverse to the decision in *Billings v. Baker*, and in accordance with the views expressed in the Supreme Court of this state. *Hurd v. Cass*, 9 Barb. 366; *Smith v. Colvin*, 17 Barb. 157; *Clark v. Clark*, 24 Barb. 581; *Vallance v. Bausch*, 28 Barb. 633; *Willard on Real Estate* 59.

And it seems to be settled, that the act does not take away the husband's right to administer upon, and to take as his own the personal property of the deceased wife where she dies intestate. *Shumway v. Cooper*, 16 Barb. 556; *Vallance v. Bausch*, 28 Barb. 633; *McCosker v. Golden*, 1 Bradf. 64; *Westvervelt v. Gregg*, 2 Kern. 202; *Ransom v. Nichols*, 22 New York 110.

The cases upon the subject, both in respect to the real and personal estate of the wife, will be found collected in 1 *Whittaker's Prac.* (ed. 1863) 177.

The demurrer must be overruled.

SUSAN WINSHIP vs. GEORGE WINSHIP.

1. A citizen of another state, bringing his effects into this, to establish a residence here, with the manifest intent of procuring a divorce, and immediately commencing a suit for that purpose, is not an inhabitant or a resident of this state, within the meaning of "the act concerning divorces." (*N.Y. Dig.* 223, § 1.)

2. Under such circumstances, this court will not maintain jurisdiction of a suit for divorce, though the charge of adultery be clearly proved against the defendant.

Slaight, for complainant.

Gilchrist, for defendant.

THE CHANCELLOR. The bill is filed for divorce, on the ground of adultery. The guilt of the defendant is clearly

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proved. The complainant admits, in her evidence, that she was living with the defendant in a state of adultery for two years prior to, and at the time of her marriage, and the evidence is quite satisfactory, that after her marriage she was guilty of adultery with a companion of her husband. The latter offence is claimed to have been condoned.

The husband admits, that since the discovery of his wife's adultery, he has been living in a state of adultery with another woman, but alleges that he did so with his wife's consent. I refer to these facts as showing that the case, as disclosed, does not commend itself to the favorable consideration of the court. It is apparent that the marriage relation was entered into by the parties as a mere matter of convenience, and is sought to be dissolved from no higher motive. The answer alleges that the bill was filed by collusion; the husband suggesting the course to be pursued, and agreeing not to make any opposition. He opposes the divorce, not because he has any objection to being discharged from his marital obligations, but because, as he insists, the wife is attempting, contrary to their agreement, to subject him to the costs of the proceeding. The wife qualifies, without denying the substance of the charge of collusion to obtain the divorce. It is apparent from the evidence, that both before and since the filing of the bill, the parties have had interviews with each other on the subject of the divorce. The conduct of the parties has been such as naturally to arouse suspicion, and justify extreme vigilance on the part of the court in guarding against gross imposition.

If there were no other ground of objection, I should have felt very reluctant, in a case characterized by such repulsive features, to interfere for the relief of either of the parties.

But there is, in my judgment, another and more decisive ground against granting relief. The parties are neither of them citizens of this state. They are citizens of the state of New York. They were married in that state. They have had their home there since the marriage. The husband testifies that he has never been a citizen of this state. At the

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time the bill was filed he lived in the city of New York, but worked for his brother in the city of Hudson. In the early part of April, 1862, shortly before the bill was filed, the woman, with whom the adultery is charged to have been committed, kept house in the city of Hudson, and the defendant sometimes slept there. When the wife received this intelligence she was living in the city of New York. The wife states that when she commenced this suit she was living in Jersey City, but she had left her trunk at a friend's in New York. She subsequently says: "When I first heard of it my trunk was at Mrs. Lewis', and I had it brought over here right away, and before I commenced this suit." Is it possible for evidence to disclose more clearly the animus with which a residence in New Jersey was chosen? Admit that the complainant, with her trunk, reached her lodgings in Jersey City a day or a week before the bill was filed, does that constitute a residence in this state within the meaning of the act of the legislature? I do not think that she was either an inhabitant or a resident of this state within the meaning of the act concerning divorces. The legislature did not intend to invite the commission of lewdness within the state, nor to hold out inducements to the citizens of other states to abandon the appropriate forum for the adjudication of their wrongs and seek redress in our courts. I cannot believe that they designed to subject the soil of the state to such pollution, or her courts of judicature to such degradation. I know that the language of the statute is very broad, and may, in its terms, embrace the case now under consideration. But I nevertheless think that the legislature were legislating for the citizens of this state, not for others. The subject is one of grave importance, and is daily assuming a more serious aspect. At this hour, a large proportion of the divorces asked for in this court is by citizens of other states, who come into this state for the mere purpose of obtaining a divorce, and often in evasion of their own laws. There is too much reason to apprehend collusion of parties in actions of divorce, in regard to the

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establishment of a domicil, as well as with respect to the procedure. Conflict of jurisdiction, injury to morals, reproach to our law, oppression and fraud, as well as obloquy to the judicature which must administer the law, are the evident consequences which must follow from the influx of parties from other states to obtain a dissolution of marriage here, in opposition to the rule of their own law.

The bill is dismissed.

CORNELIUS BENSON *vs.* DENNIS WOLVERTON.

1. The rule, irrespective of the statute, is that where a sole plaintiff or defendant dies before decree, the suit cannot be revived at the instance of the defendant, or of his legal representative.
 2. The statute has not altered the practice, except by providing a more expeditious mode of proceeding by *order*, instead of resorting to a bill of revivor.
 3. No costs are given, either under the statute, or by practice irrespective of the statute, if the complainant, or his representative, elect not to proceed.
 4. Where a sole plaintiff or defendant dies after the final argument, but before decree, the court may order the decree to be signed as of a date prior to the death of the party.
 5. Where a sole plaintiff or defendant dies *after* decree, either party may revive the suit.
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On motion by the defendant, for an order to revive suit on the death of a sole complainant. The bill had been dismissed.

Titsworth, for the motion.

J. W. Taylor, contra.

THE CHANCELLOR. By the provisions of the act to prevent the abatement of suits, *Nix. Dig.* 1, where a sole plaintiff or defendant dies before decree, the suit cannot be revived at the instance of the defendant, or of his legal representa-

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tives. Where a sole plaintiff dies, his lawful representative, or any person interested by the death of such plaintiff, may cause himself to be made complainant in the suit. Where a sole defendant dies, the plaintiff may cause the legal representatives of such defendant, or any person who has become interested by his death, to be substituted as defendant, unless he signify his disclaimer to the matter in controversy. *Nix. Dig.* 3, § 6, 7.

And if the legal representative of the deceased plaintiff, or other person becoming interested by his death, will not cause himself to be made complainant in the room of the deceased plaintiff; or in case of the death of the defendant, if the plaintiff will not make the legal representative of the deceased defendant, or other person who may have become interested by his death, a party to the suit, and cause the suit to stand revived within such time as the court shall limit and appoint for that purpose, the suit shall be considered at an end, and shall not be revived in the manner provided by the act. *Nix. Dig.* 3, § 8.

In either event, the suit will not be revived at the instance of the defendant, or of his representatives. The rule is the same, irrespective of the statute. 2 *Daniell's Ch. Pr.* 954; 3 *Ibid.* 1700, 1701.

The statute has not altered the practice except by providing a more expeditious mode of proceeding, by substituting new parties and continuing the suit by order, instead of resorting to a bill of revivor. *Adamson v. Hall*, 1 *Turner & Russ.* 258; *Porter v. Cox*, 5 *Madd.* 80; 1 *Smith's Ch. Pr.* 514; 2 *Daniell's Ch. Pr.* 954; 3 *Ibid.* 1701.

Neither under the statute, nor by the practice irrespective of the statute, are costs given if the complainant, or his representative, elect not to proceed.

But where a complainant or defendant dies after the final argument, but before decree, the court may order the decree to be signed as of a date prior to the death of the party. 2 *Fowler's Excheq. Pract.* 169; *Davies v. Davies*, 9 *Vesey* 461; *Campbell v. Mesier*, 4 *Johns. Ch. R.* 342; *Vroom v. Ditmas*,

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5 *Paige* 528; 2 *Daniell's Ch. Pr.* 1219, and note 1; 2 *Mad. Ch. Pr.* 529 (ed. 1822).

And although the rule is strict that before decree a suit cannot be revived at the instance of the defendant, it is otherwise after a decree; for the rights of the parties are then ascertained. Plaintiffs and defendants are equally entitled to the benefit of the decree, and either has a right to revive it. 3 *Daniell's Ch. Pr.* 1702; *Story's Eq. Pl.*, § 372; *Peer v. Cookerow*, 2 *Beas.* 136.

Whether a suit will be revived after a decree of dismissal, or for the mere purpose of recovering costs, it is unnecessary now to consider. No opinion is intended to be intimated upon the question whether this is a proper case for a revivor, even after decree. It is clear that it is not a case within the provisions of the statute, and if the suit be revived, it can only be by bill of revivor.

RYKE J. SUYDAM and EPHRAIM WILLIAMSON and ROSETTA, his wife, executors of Daniel Davison, deceased, *vs.* HENRY JOHNSON and SARAH, his wife.

1. The inquiry when the cause is heard upon a plea, is substantially as if the complainant had *demurred* to the plea.
2. If the complainant deems the plea bad, the case goes to hearing upon the plea; if good, but not true, he takes issue upon it and proceeds as in case of an answer.
3. The subject of inquiry is not the mere technical form of the plea, but the sufficiency of its averments to sustain the defence; whether assuming all the facts properly set out in the plea to be true, it presents a valid defence.
4. The pendency of a former suit being pleaded in bar, the defendant may state the pendency and object of the former suit, and aver that the present suit was brought for the same matters; or he may omit the averment that the suits are for the same subject matter, provided he state facts sufficient to show that they are so.
5. A complainant cannot compel a demurrer upon the facts as stated in the bill, if they are imperfectly or inadequately stated. The defendant

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must be at liberty to plead the facts upon which he relies for his defence, in such form and with such detail as to raise the real question which he desires to present.

6. An award constitutes no valid defence to an action, unless it clearly appear that the subject matter of the suit was within the award.

The facts essential to an understanding of the case are fully stated in the opinion of the Chancellor.

Strong, for complainants, cited *Story's Eq. Pl.*, § 660.

A. V. Schenck, for defendants, cited *Nix. Dig.* 99, § 23, 24; *McEwen v. Broadhead*, 3 Stockt. 129; *Flagg v. Bonnel*, 2 Stockt. 82; *Cooper's Eq. Pl.* 280; *Kyd on Awards*, ch. 8, p. 381; *Farrington v. Chute*, 1 Vernon 72.

THE CHANCELLOR. To a bill for relief, the defendants pleaded an award in bar. The cause was set down for hearing and heard upon the plea. The argument involved both the merits of the plea and the proper subjects of inquiry under it. It was insisted for the defence that the only proper subject of inquiry is whether the plea is in proper form, and that if it is, the plea must necessarily be sustained. The question is not strictly whether the plea is in proper form, but whether in the language of the statute the plea be good; that is, whether upon the face of the plea it presents, if true, a valid defence to the action. [The inquiry when the cause is heard upon the plea, is substantially as if the plaintiff had demurred to the plea. The question is not whether the plea is true, but whether, if true, it is a good defence. This is the obvious meaning of the statute. If the complainant deems the plea bad, the case goes to hearing upon the plea. If he conceives the plea to be good though not true, he takes issue upon it, and proceeds as in case of an answer.] *Nix. Dig.* 99, § 24; *Flagg v. Bonnel*, 2 Stockt. 82; *McEwen v. Broadhead*, 3 Stockt. 129.

The subject of inquiry is not the mere technical form of the plea, but the sufficiency of its averments to sustain the

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defence: whether it is good both in form and in substance; whether, *viz.* assuming all the facts properly set out in the plea to be true, it presents a valid defence.) This is the real meaning of the Chancellor in the cases cited, though the language used admits of misconstruction. The extent of the inquiry must therefore depend upon the structure of the plea itself. If the pleader confine himself to a simple and direct averment of the facts essential to constitute the plea, the inquiry is within very narrow limits. But if, instead of this, he sets out facts and circumstances from which he asks the court to infer the fact necessary to sustain his plea, the inquiry necessarily takes a wider range, and the court must determine whether the facts stated are tantamount to a direct averment of the fact, or serve to establish the fact essential to the validity of the plea. And if the pleader go one step further, and not only spread upon the record the facts upon which he relies to establish the validity of his plea, but the result of those facts, or the inference which the pleader draws from the facts, the court, in deciding upon the validity of the plea, must be controlled by the facts stated, and not by the averment of the plea as to the result of those facts.

The defendant pleads the pendency of a former suit in bar. He may content himself with stating the pendency and object of the former suit, and averring that the present suit was brought for the same matters. The ordinary form will be found in *Beames' Pleas* 330; *Equity Draftsman* 658; *Curtis' Precedents* 170. Or he may omit the averment that the suits are for the same subject matter, provided he state facts sufficient to show that they are so. *Flagg v. Bonnel*, 2 *Stockt.* 82.

The defendant in this case has spread upon his plea the substance of a former bill in this court. He has set out in full the submission and the award, and then avers that the subject of this suit is within the award. Now, whether it is or is not within the award, must obviously depend upon the facts stated upon the plea, admitting those facts to be truly

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stated. That is really the question now in controversy between the parties.)

(The difficulty in the case has grown out of its complicated character and the peculiar structure of the pleadings. The complainants set out in their bill the history of a long and involved controversy between the parties, including the award which is made the subject of the plea. It is a ground of objection to the plea that it states no new matter not apparent upon the bill, and that the proper relief was by demurrer. But a complainant cannot compel a demurrer upon the facts as stated in the bill, if they are imperfectly, or inadequately stated. The defendant must be at liberty to plead the facts upon which he relies for his defence, in such form and with such fullness of detail as to raise the real question which he desires to present. The question certainly, by a different character of pleading, might have been presented more clearly and with less embarrassment. But although the plea is encumbered with matter not pertinent to the defence, I prefer to dispose of the plea not on any technical ground, but to decide the real question at issue between the parties. That question is whether the submission and award do in fact include the subject matter of this suit.)

The controversy grew out of the settlement of the estate of Daniel Davison. The testator died in 1855, leaving, among other children and heirs-at-law, three daughters; Rosetta, who has since intermarried with Ephraim Williamson, Elizabeth, the wife of Ryke J. Suydam, and Sarah, the wife of Henry Johnson, who were also devisees under his will. He appointed his unmarried daughter Rosetta, and his sons-in-law, Suydam and Johnson, his executors, who proved the will and took upon themselves the burden of its execution.

Sarah Johnson had previously been married to Noah Applegate, who was deceased, leaving two children, Daniel and Elijah; the latter being a minor. His estate, amounting to \$1600, was in the hands of the testator, Daniel Davison. Of this sum Sarah Johnson, as widow, was entitled to one-third,

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and her two children to the remaining two-thirds. She released her interest in favor of her children, who thereupon became creditors of the estate of the testator in the sum of \$800 each. The real estate was sold by his executors. Daniel Applegate, one of Sarah Johnson's sons, became the purchaser. His share was deducted from the purchase money of the estate. The share of Elijah was secured by a mortgage on the farm, given to Sarah Johnson as guardian of her son Elijah. She was not in fact the guardian of her son. The bill alleges that the arrangement was made with the consent and approbation of her husband, and upon her promise to take out letters of guardianship for her son. The money was lost, the mortgage proving worthless. After the minor came of age, he made a will giving his whole estate, real and personal, to his mother, and appointing his father executor. The executor having renounced, an administrator with the will annexed was appointed. A suit at law was brought by him to recover the \$800 due from the estate of the testator, Daniel Davison. The executors having settled their accounts, the suit was brought against the devisees and heirs-at-law. A bill in equity was filed, among other things, for an injunction to restrain that suit. Pending these suits the submission and award in question were made.

The submission includes three points:

1. Whether the administrator of Elijah Applegate had any claim against the devisees of Daniel Davison for moneys received by him from the estate of Noah Applegate.
2. Whether Johnson and wife had any lawful demand in right of the wife against said devisees, for moneys received by Daniel Davison from the estate of Noah Applegate.
3. Whether Johnson and wife had any lawful demand in right of the wife, against Williamson and wife and Ann C. Vanderveer, for interest upon a bond and mortgage given by Daniel D. Applegate.

(There is nothing in the submission which can include the subject matter of this suit.

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The question involved in it could not, under the terms of the submission, have been submitted to, or decided by the arbitrators. If there is anything in the language of the award which can by possibility bear a broader interpretation, it should be construed in reference to the power conferred. The administrator of Elijah Applegate had a clear right of recovery which could not be affected by any real or supposed equity between Sarah Johnson and these complainants.

The facts stated in the plea constitute no bar to the suit. Nothing could be gained by a reference to a master. The question must be decided upon the facts now before the court. An exception to the master's report, if made by either party, would present the same question again for decision here.

The plea is overruled.

SIMEON BEDFORD vs. THE NEWARK MACHINE COMPANY.

1. The only criterion of insolvency, furnished by "the act to prevent frauds by incorporated companies," (in regard to companies other than banking) is the *suspension of business*.
2. The act of insolvency contemplated by the statute, is committed at the time the company suspends its ordinary business operations.
3. Under the 42d section of "the act to authorize the establishment, and to prescribe the duties of companies for manufacturing and other purposes," all laborers in the employ of the company at the time of the *suspension of its business operations*, and not those only in their employ at the time of instituting legal proceedings against them as an insolvent corporation, are entitled to priority in payment over the other creditors of the company.
4. The *apprentices* of such company are entitled to their wages without regard to the time that they were last actually laboring for the company. Their legal rights cannot be affected by the refusal or inability of the company to furnish them with employment.

An injunction having been issued against the defendants as an insolvent corporation, under the "act to prevent frauds by incorporated companies," receivers were appointed who

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are now settling the affairs of the company. The receivers have filed their petition, asking the direction of the court in the disposition of the funds in their hands.

Ranney, for petitioner.

J. P. Jackson, jun., for laborers and apprentices.

THE CHANCELLOR. The bill in this case was filed on the twenty-third of October, 1861, and an injunction thereupon issued against the defendants as an insolvent corporation, restraining them from exercising their corporate powers.

On the twenty-ninth of October, 1861, receivers were appointed, by whom the affairs of the company are being settled, and who now ask the direction of the court in the disposition of the funds in their hands.

The company was incorporated under the provisions of the act of 1849, authorizing the establishment of manufacturing companies, and of the supplements thereto. *Nix. Dig.* 492. By the forty-second section of the act, it is provided that, "in case of the insolvency of any company formed under the provisions of this act, the laborers in the employ of said company shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of the company." At the time of filing the bill and issuing the injunction, the company was indebted to about forty laborers in the sum of \$2208.07. Of these laborers, only twelve were in the actual employ of the company at the time of filing the bill. The others had ceased working for the company at various times, from and after the twenty-third of March preceding. It is insisted on the one hand, that they are all entitled to priority in payment over the other creditors of the company; and on the other, that those laborers alone are entitled to priority, who were in the employ of the company when the proceedings in this cause were instituted, and the business of the company restrained. By the terms of the act, the lien upon the assets of the company, and consequent priority in payment, is not given to laborers to whom the

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company are indebted merely, but to laborers *in the employ of the company*. There is a marked contrast between the phraseology of this act and that of the "act for the protection and relief of mechanics and laborers." *Nix. Dig.* 34, § 27. By the terms of the latter act, under an assignment for the benefit of creditors, the wages of clerks, minors, mechanics and laborers, *due at the time of making the assignment* from the person making the same, are declared to be preferred debts, and entitled to priority in payment. It seems probable that the terms of the act now in question, as well as those of the "act to secure to operatives in manufactories and other employees, their wages," *Nix. Dig.* 46, § 69, were adopted not only to secure remuneration to the operatives, but upon a principle of sound public policy to encourage manufactures by inducing the operatives to continue their labor, notwithstanding the inability, real or apprehended, of the employer to pay their wages. Those laborers only are entitled to priority in payment, who were in the employ of the company at the time of their becoming insolvent. But how is that time to be determined? The company were embarrassed and found difficulty in meeting their engagements as early as April, 1861, and the facts now before the court might perhaps justify the conclusion that they were then indebted beyond their ability to pay. But they continued their business operations, so far as appears, uninterruptedly, until the twenty-fourth of September, when they made their last weekly payment to their laborers. On the same day two judgments were entered, and writs of *fieri facias* issued against them for small amounts. By virtue of these executions levies were made, and the premises occupied by the defendants were closed by the sheriff, but after remaining closed a day or two they were again opened. On the thirtieth day of September, two other judgments, amounting to about \$24,000, were entered and executions issued thereon, after which time until the issuing of the injunction, the laborers remaining in the employ of the company were employed on short time; the amount of

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wages paid them at any one time not exceeding one third the amount due. All the above executions were outstanding, unsatisfied claims on the property of the company, when the injunction was issued. The bill, which is exhibited by a director of the company, charges that the company were insolvent and became known to be so on the first of October, 1861. The bill further charges that the company is insolvent to the knowledge of the complainant, and cannot resume its business with safety to the public, and advantage to the stockholders. There is no evidence of any change in the operations of the company between the first of October and the time of issuing the injunction. Their business was suspended on the first of October, as fully as at the time of granting the injunction. From that time the machinery and stock of the company, manufactured and unmanufactured, were under levy for an amount exceeding their value, and were in the hands and under the control of the sheriff. The operations of the company were virtually suspended from inability to carry them on, upon the first of October. The act of insolvency was then committed. All the laborers at that time in the employ of the company have a lien for their wages, and are entitled to priority in payment out of the assets in the hands of the receivers. It is unnecessary to inquire whether the insolvency of the company may not be dated from the twenty-fourth of September, when the works were first closed under execution, for none of the laborers left the employ of the company between those dates. Prior to the twenty-fourth of September, there is no ground upon which the company can be declared insolvent for the purposes of the present inquiry.

The act respecting insolvent corporations, under which these proceedings were instituted, looks to the suspension of the ordinary business of the company, or some overt act by which its insolvency may be ascertained and declared. The court cannot, upon an inquiry of this nature, undertake to investigate the financial ability of the corporation at previous periods, founded upon mere failure to meet its engagements,

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or upon the actual state of its finances after its business has been suspended. The bankrupt laws of England have, with great precision, defined what shall constitute an act of bankruptcy, upon which proceedings may be instituted and the party declared a bankrupt. The act in question has furnished such criteria or evidences of insolvency in regard to banking companies. *Nix. Dig.* 372, § 6. In regard to other companies, no criterion is furnished except the *suspension of business*. Before an injunction can issue, it must appear that the company has become insolvent, and shall not be about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders. *Nix. Dig.* 372, § 5.

The *apprentices* of the company are entitled to their wages without regard to the time that they were last actually laboring for the company. There is no evidence that they were discharged or released from their indentures prior to the act of insolvency. Their legal rights cannot be affected by the refusal or inability of the company to furnish them with employment.

It appears from the receivers' report, that large expenses have been incurred in repairs to the real estate, and to the machinery covered by mortgages and executions, and in employing watchmen for the safe keeping of the property, both real and personal. It is proper, therefore, that it should be referred to a master, to ascertain and report what, and to what an amount of the said expenses and disbursements shall be paid from the fund raised from the sales of machinery and personal property encumbered by said mortgages and judgments. The receivers' accounts will also be referred to a master, with directions to examine, and, if necessary, to restate the same; and also to report what will be a reasonable and just compensation to be allowed to the receivers.

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EMILE C. BERCKMANS vs. SARA E. BERCKMANS.

1. The evidence of an alleged paramour, being *particeps criminis* is but weak. But neither his evidence, nor that of the woman charged with adultery, is to be rejected on the *assumption* that they are guilty.
2. Express testimony cannot be rejected on the sole ground of its improbability. Its *impossibility* alone can discredit the witness.
3. A witness must state *facts*, not inferences, and the court can draw no inference, which the facts as proved do not justify.
4. The testimony of one witness uncorroborated, unsupported, and in its details improbable, is not sufficient to establish the charge of adultery, against the full and explicit counter testimony of the person accused and her *particeps criminis*.
5. It is not necessary that the offence should be proved in time and place as charged in the bill. The mind of the court must be *satisfied* that actual adultery has been committed, but if the circumstances establish the fact of general cohabitation, it is enough, although the court may be unable to decide at what time the offence was committed.
6. *Parol evidence* of the declarations of a *particeps criminis*, even though he has confessed his guilt, is not competent evidence against the party charged with adultery.
7. To establish the existence of adultery, the circumstances must be such as would lead the guarded discretion of a reasonable and just man to that conclusion. It must not be a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations.
8. The facts proven must be such as can not be reconciled with probability and the innocence of the parties.
9. Mere imprudence, indiscretion, or folly, is not conclusive evidence of guilt. The mind of the court must be *satisfied*, that there was an intimacy between the parties entirely inconsistent with the duty which a virtuous wife owes to herself and to her husband.
10. When the conduct of a party admits of two interpretations equally consistent with probability, the one involving guilt and the other consistent with innocence, the rules of evidence as well as the dictates of justice require that the interpretation should be favorable to innocence.
11. In the investigation of a wife's guilt, the conduct of the husband is always regarded as a most significant circumstance. So long as there is reasonable doubt of her guilt, or a plausible ground for a hope of her innocence, the husband's forbearance is both excusable and laudable. But when the husband holds in his hands what he claims to be satisfactory proof of his wife's guilt, his delay to prosecute is strong evidence in the wife's favor.

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12. To prove adultery by circumstantial evidence, two points are to be established; the opportunity for the crime, and the will to commit it. Where both are *established*, the court will infer the guilt.

Williamson and *Frelinghuysen*, Attorney General, for complainant.

Titsworth and *Parker*, for defendant.

THE CHANCELLOR. The bill is filed by the husband against the wife for a divorce, on the ground of adultery. The parties were married at Plainfield, in this state, where they both resided, on the eighth of February, 1858. At the time of the marriage the husband was about twenty-three, and the wife twenty-one years of age. Two children were born of the marriage, *viz.* a son, who was born near Augusta, Georgia, where the parties temporarily resided, on the eighteenth of February, 1859, and a daughter, born at Plainfield, on the third of April, 1860. They continued to cohabit as man and wife until September nineteenth, 1860, when the wife left the house of her husband, with her two children, and went to the city of New York, where she remained about ten days, when she returned with the children to Plainfield, and went to reside with her mother.

On the fourteenth of November, 1860, she filed her petition in this court asking a divorce *a mensa et thoro* from her husband, on the ground of extreme cruelty, and charging that she was compelled to leave his house in consequence of his ill-treatment, which became unendurable. On the sixteenth of January, 1861, the wife filed her petition for alimony *pendente lite*, which was granted on the fifth of February thereafter. On the last named day, the bill in this cause was filed by the husband, asking a divorce *a vinculo matrimonii*, on the ground of adultery. The further prosecution of the suit, instituted by the wife, was thereupon suspended, and the suit of the husband is now brought to final hearing upon the pleadings and proofs.

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The adultery is charged to have been committed on different days in the months of May, June, July, August, September and October, 1859, and in the months of June and September, 1860, with one Randolph Titsworth, and with other persons unknown to the complainant. The answer fully denies the charge of adultery, re-affirms the charges of cruelty preferred against the husband in her bill of complaint against him, and also the charge that she was compelled by his ill-treatment to leave his house.

The simple question in the case is, whether the evidence is sufficient to support the charge of adultery. The complainant offers both direct and circumstantial evidence of the charge; direct evidence I mean of facts, from which the conclusion of guilt is a necessary and unavoidable inference.

I. As to the direct evidence. Mrs. Maria E. Berckmans, the mother of the complainant, testifies that in June, 1859, she saw the defendant lying on the sofa in the parlor, and Dr. Titsworth lying on her. She further testifies, that in the fall of the same year, she saw the defendant sitting on a chair in her bed-room dressed in a loose sack, with her neck and bosom exposed, and Dr. Titsworth sitting close by her in another chair, with one of his arms lying on the defendant's neck, and kissing her. His other hand had hold of one of the defendant's hands, and was lying on her lap. The witness adds: "I stayed looking at them only one moment, till the defendant got up, and he put both arms around her and kissed her, and then I went away." If this testimony is true, it precludes the necessity of further investigation. All speculation as to the guilt or innocence of the defendant is at an end. But the defendant and the alleged *particeps criminis* have been examined. They both utterly and most explicitly deny the truth of the charge. Dr. Titsworth testifies, in regard to the parlor scene: "I never was lying upon the sofa, neither was Mrs. Berckmans, in my presence. There is no truth in the statement of the witness. * * * I pronounce her statement in regard to the bed-room scene

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emphatically false. There is not the first particle of truth in it whatever. There is no foundation for it. I believe I never was in that room alone with her in my life. I was never in any room with Mrs. Berckmans in the position her mother-in-law described, or in any indecent or improper position." The defendant herself is equally emphatic in her denial of the truth of the charge. Neither of these witnesses is entitled to the credit of fair and impartial witnesses. It is not an unnatural presumption, if parties are guilty of adultery, that they will not hesitate to resort to perjury to conceal their guilt. The alleged paramour being *particeps criminis*, his evidence is but weak. 2 *Greenl. Ev.*, § 46. But their evidence is not to be rejected on the assumption that they are guilty. In the absence of very clear evidence of their guilt, their evidence is to be fairly weighed and considered. We have then the testimony of both the parties implicated, against the evidence of the one witness on the part of the complainant. How far is her testimony corroborated, or discredited by circumstances, or by other evidence in the case?

1. The complainant's witness states that the sofa upon which the transaction occurred in the parlor, stood on the side of the room, opposite to the door, with the back of the sofa against the fire place. The defendant alleges, and offers evidence to prove, that in June, 1859, at the time of the alleged transaction, the sofa stood on the opposite side of the room, behind the door. It is clearly shown that the place usually occupied by the sofa, was against the mantel. It is shown, I think with equal clearness, that during a part of the summer of 1859, it stood on the opposite side of the room. But when it was removed, or where it stood in the month of June, 1859, is not ascertained by the evidence with sufficient clearness to discredit the testimony of the complainant's witness.

2. It is insisted on the part of the defence, admitting the sofa to have stood where the witness alleged it did, that it was physically impossible for her to have seen from the posi-

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tion which she says she occupied, either the transaction in the parlor or in the bed-room. These objections were the result of investigations made under the direction of counsel, and were doubtless made in good faith, and with a full conviction of their truth. The high professional character of the counsel, no less than the circumstances under which they were presented, forbids the idea that they were raised or urged with any unfair purpose, or otherwise than with a full conviction of their truth.

The witness stated that she saw the transaction in the bed-room through the window of her dressing-room and through the window of the bed-room. Respectable witnesses, after repeated experiments, testified that they were utterly unable to see any object in the bed-room, looking through the windows of the two rooms, or even by opening the window of the dressing-room. Other witnesses testified that objects could be distinctly seen from one room to the other, looking through both windows. The witnesses on both sides testified with equal confidence and manifestly with equally firm convictions of the truth of their respective statements. And in the earlier stages of the evidence there was a serious and apparently irreconcilable conflict in the testimony. But in the progress of the testimony, the cause of the difficulty has been satisfactorily explained. The window of the dressing-room opened to the east, the window of the bed-room to the south, at the distance of two or three feet from the dressing-room window. The line of vision was such that the external light falling upon the glass of the window of the bed-room obliquely, was reflected to the eye of the observer, thus converting the window into a mirror, and leaving the room beyond in utter darkness. By partly closing the shutter of the window on the side opposite to the observer, so as to prevent the reflection, the whole difficulty was avoided, and objects within the bed-room rendered clearly visible. This objection to the credibility of the witness is thus removed. Simple as the solution now seems, it was not discovered till *much* testimony on the point had been taken. The witness

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had testified that it was a bright day, and the windows had been thrown open, so that the room was very light. Looked at apparently under the same conditions of light nothing could be seen, and the counsel of the defendant strenuously insists that this arrangement of the shutter was an after-thought, a mere fraudulent contrivance to remove an otherwise insuperable objection to the credibility of the testimony, and that it is in the highest degree improbable that the witness should have seen this transaction under the precise conditions which alone would have enabled her to see it. This objection may be entitled to consideration in weighing the probability of her evidence. But for the purpose of discrediting the witness, the whole force of the objection consists in the position that it was *impossible* for her to see. Express testimony cannot be rejected on the sole ground of its improbability.

3. The witness further testified that she saw the transaction upon the sofa in the parlor, from the green-house, through a window which opened into the green-house from the parlor. The sofa stood under the mantel, with its back against the breast work of the chimney, and toward the side of the room in which the window was. But a small part of the end of the sofa projected beyond the breast work of the chimney, so that a large portion of the sofa was entirely concealed from the view of a person at the window. The back of the sofa at the end was high, and was directly in the line of vision between the window and the seat of the sofa. Careful measurements have been made and furnished, with a diagram, to the court, the accuracy of which are not called in question, and which, it is insisted, render it demonstrably certain that the witness could not have seen persons lying on the sofa as she testified. The witnesses on the part of the defendant, by whom the premises were examined, testify that the experiment was made and repeated in their presence, and that a person lying on the sofa could not be seen from the position in which the witness stood. Other witnesses of equal respectability, by whom the premises were subsequently

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examined, testify not only that a person lying on the sofa may be seen, but that the seat of the sofa itself may be seen by a person looking over the back. This seems to me to be incredible, assuming that the observations in both cases were made under the same conditions and were fairly made and stated; and physically impossible, if the measurements furnished to the court were accurate. I confess that I am totally unable to reconcile this conflict in the testimony except upon the hypothesis, either that there was some change in the relative elevation of the floor of the green-house and parlor, so that the position of the observer and altitude of the point of vision was changed, or that a change was made in the sofa itself. The latter is the theory of the defendant's counsel. He insists that when the complainant's witnesses were called to examine the premises, another sofa with a lower back was fraudulently substituted, by which device the witnesses were innocently and unwittingly induced to give evidence necessarily calculated to pervert the truth and mislead the court. Evidence is offered tending to support this view of the case. But I do not choose to rest the decision of this point in any degree upon this ground, involving as it necessarily does the imputation of fraudulent conduct to the complainant. It seems entirely unnecessary to do so. The first examination of the premises by the defendant's witnesses was made before the cross-examination of the complainant's witness, Mrs. Maria E. Berckmans, was closed. The examination and experiments were made in her presence. She took part in making them, and when it became obvious that a person lying on the sofa could not be seen from the position in the green-house which she occupied standing on the floor, she said that she stood upon a chair, and showed where she procured the chair, and where she placed it. She alleged that her daughter-in-law wore hoops, which raised her dress very much above the seat of the sofa, which enabled her to see the skirt of her dress. And when recalled to the stand and her cross-examination resumed, the witness says: "the sofa of which I have spoken, is the same sofa now in the

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room ; it was standing as it now does. I saw no part of Mrs. Berckmans' person. I saw only a part of her dress. I couldn't tell what part." And in answer to the question whether she saw any part of Dr. Titsworth's person, she answers : "I saw Dr. Titsworth's feet, his boots, and the feet lying on the sofa, on the same side of the sofa where I was looking through the window." Now it is admitted that next to the window of the green-house, a part of a boot of a person lying on the sofa might be seen. There is a very abrupt descent of the back of the sofa as it curves at the end, forming a low arm, six to nine inches in length from the curve of the back, and only nine inches in height. At that point, the boots of a person on the sofa might be seen. This is all the witness on her cross-examination pretends she saw. It is needless to say it is a most serious alteration of her original testimony, that she saw these persons lying together on the sofa. Her statement of what she saw may be literally true, and yet her inference totally groundless. Nor does it relieve the difficulty, to say that she may have seen the boots and the dress in a position to justify her inference. A witness is to state facts, not inferences, and the court can draw no inference which the facts as proved do not justify. While this evidence, therefore, does not utterly discredit the witness, it goes far to shake the reliability of her testimony. It shows that what she originally swore she saw was a physical impossibility, and that after that fact had been ascertained, her evidence was so modified to meet the emergency as to render it of little or no significance. While, therefore, the evidence of the defendant is not sufficiently decisive utterly to discredit the witness, it goes far to shake the reliability of her testimony, and to require that it should be closely scrutinized.

I turn, therefore, to other aspects of the evidence of the witness, and of the attendant circumstances, which I deem of importance as effecting her credibility. This transaction is alleged to have occurred in June, 1859. At that time and for months afterwards, not the least intimacy is shown to

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have existed between these parties. The complainant was married on the eighth of February, 1858. His wife, at the time of the marriage, was twenty-one years of age, and resided in Plainfield, with her mother. Her position in life was humble. Her mother kept a small fancy store. The daughter taught music in private families in Plainfield, and acted as organist of the Episcopal Church. So far as appears from the evidence, she had won for herself the respect and confidence of the community. After her marriage she remained in Plainfield with her husband until the nineteenth of September following, when they went to Georgia, where her first child was born, on the eighteenth of February, 1859. Near the close of April, 1859, she returned to Plainfield with her husband and infant, and went to reside with her mother-in-law, Mrs. Maria E. Berckmans, both families using in common a parlor adjoining the main hall of the house, upon the first or lower floor. Dr. Titsworth, with whom the adultery is alleged to have been committed, was a physician practising in Plainfield. He was a married man, over forty years of age, a father, and the member of a Christian church. He had been the physician of Mrs. Berckmans before her marriage. He was called to attend her after her return from the south, and did so at the house of the mother-in-law. No particular intimacy is shown to have existed between them at this period, except from the evidence of Mrs. Maria E. Berckmans herself. There is not in the evidence a whisper unfavorable to the reputation of either of these parties, or to the character of their intercourse, except from the lips of the mother-in-law. Is it probable, under such circumstances, that the parties would have committed so gross an act of adultery in broad daylight, in the parlor occupied in common by two families, under the very eye of the mother-in-law, exposed to observation from without, with an open window into the green-house, liable to the prying curiosity or casual observation of servants, and in a situation where, if the parlor door was opened, escape from detection was impossible? Would the physician have thus foolishly

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hazarded his reputation? Would a young wife, who had been married but a few months, have thus madly hazarded reputation, character, independence, social position, and all that she had gained by her marriage?

Nor does the conduct of the mother-in-law appear to me consistent or reconcilable with her knowledge of the infidelity of her daughter-in-law. Her son was an only child, in whose welfare she must have felt the deepest interest. So long as the infidelity of his wife was a matter of doubt or suspicion, she would naturally have remained silent, and confined her suspicions to her own breast. But when she had been herself an eye witness of her guilt, when she knew with absolute certainty the unfaithfulness of the wife and the dishonor of her only son, it seems but natural that she should have made some effort to reclaim or restrain the wife, or at least to assure the son of the wrong he was suffering, that he might guard against its continuance. She disliked the daughter-in-law. She was opposed to her marriage to her son. She refused to be present at the wedding. She naturally preferred that her son should marry one of her own nation, of her own religious faith, and of his own sphere in life. He did neither. Regarding the daughter-in-law as an alien to her race, as a heretic in religion, and probably as a dishonor to her family, it was natural that the mother should entertain for her the most unfriendly feelings. She avows frankly that she disliked her at the time of her marriage, and that her dislike increased. There was obviously no sympathy or kindly feeling existing between them. The daughter-in-law was tolerated under the mother's roof for the son's sake, but it does not appear that she ever received from her a word of kindness or sympathy. There was no feeling of kindness to restrain the disclosure of the wife's infidelity. It is in evidence that the wife was treated by the mother-in-law with unkindness, if not with cruelty. She threatened, as she admits, for unguarded, perhaps disrespectful language on the part of the wife, to drive her from her house. She charged her in the hearing of her servants with theft, and yet she

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admits that she never charged her with adultery, nor sought to turn her from her house on that account. It appears from the evidence that the mother-in-law, on the first of January, 1860, with full knowledge of the guilt of her son's wife—witnessed by herself in June—confirmed by what she saw in October, went to Georgia on a visit to her husband, leaving her son in possession of the house, and the wife in charge of the establishment, without a word of remonstrance to the wife, or of caution to her son, or even of information to her own husband. The son having removed to another residence during the absence of the mother in Georgia, and the wife having given birth to a second child in April, returned to the mother's house, with her consent and approbation, in September, where she remained until she abandoned him for alleged misconduct. Even after the wife had left her husband, the mother-in-law declared that her doors were open to the daughter-in-law if she chose to return. Now, that a mother, a woman of wealth and of respectable social position, should so have demeaned herself, seems to me in the highest degree unnatural and improbable. Her love for her son, her dislike for his wife, her regard for her own reputation and that of her family, would have prompted her to speak and to act. But for fifteen months not one word of friendly warning to the son, not one word of kindly remonstrance, or indignant rebuke, or angry condemnation to the daughter-in-law, escapes her lips. She quietly submits to have her house turned into a brothel, and to have a foul blot inflicted upon the honor and reputation of her family. It would be a reflection upon the witness to credit her statement that she saw what she now imagines, or says she saw, or believed what she now professes to believe. There is no evidence at the time of this transaction, or until the following year, of any intimacy between the wife and Dr. Titsworth. He testifies (and so is his account) that he visited the house twice in May, on the twenty-fifth and twenty-sixth, to vaccinate the child, and that he did not visit the house again professionally until September, and no witness has

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been called to show that he was there. He says that he was in the house, but once in the month of June, when he called to procure the scab from the arm of the child, and that he did not then see Mrs. Berckmans, but the servant only. Under these circumstances, I do not think the testimony of Mrs. Berckmans, uncorroborated and unsupported as it is, sufficient to establish the charge of adultery, against the full and explicit counter testimony of the defendant herself, and of Dr. Titsworth.

II. The direct evidence of guilt having failed, the complainant's case must rest upon the circumstantial evidence adduced in its support. It is clearly not necessary that the offence should be proved in time and place. The mind of the court must be satisfied that actual adultery has been committed, but if the circumstances establish the fact of general cohabitation it is enough, although the court may be unable to decide at what time the offence was committed. *Loveden v. Loveden*, 2 Hagg. C. R. 1; *Hamerton v. Hamerton*, 2 Hagg. E. R. 8; *Grant v. Grant*, 2 Curties 16; *Bishop on M. and D.*, § 422.

The first of the chain of circumstances relied upon in proof of the general cohabitation of the parties, is the length and frequency of the doctor's visits to her.

This evidence covers a period of about five months, from the last of March, or first of April, to the first of September, 1860, during the period that the complainant lived in his brother Prosper's house, on the opposite side of the road, and a short distance from his mother's. Five witnesses testify upon this point. One of these witnesses, John Simpson, speaks of Dr. Titsworth visiting the house frequently between the first of January and March. He thinks the complainant removed into the house on the first of January. In this he is clearly mistaken. The complainant did not remove into his brother's house until late in March, a few days before the return of his mother from Georgia. So she testifies, and so the evidence in the case clearly shows. After the first of

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April, the witness knew of his making from five to ten visits of from half an hour to an hour's duration. Elizabeth Randall testifies to his making one visit of three hours duration in June. John Thys, who was in the complainant's employ as a laborer four or five days, but not consecutively, in June, testifies that every day he was there, the doctor visited at Mr. Berckmans between nine and twelve in the morning, while Mr. Berckmans was absent from home. Jacob V. Coles and Jane Gwynn also testify to frequent visits, sometimes four or five times a week, sometimes twice a day, sometimes an hour in length, and on one occasion over two hours.

The frequency and length of these visits, especially in the absence of the husband, without explanation, would certainly justify grave suspicions. But it is shown that Mrs. Berckmans was confined with her second child on the third of April, when her eldest was but little more than a year old, that after a partial recovery she suffered a relapse, and that she continued a long time in delicate health, having the care of two young children, without a professional nurse. It appears from the doctor's account book, which is produced in evidence, that he visited Mrs. Berckmans twice in March, previous to her confinement, that he delivered her of a child on the third of April, that during the month of April his professional visits were very frequent, and that they continued with greater or less frequency during the summer. None of his visits were made secretly or at unusual times. The only circumstance of suspicion is that they were long, and generally made during the husband's absence. It appears that the husband was absent daily at the seminary, from nine to twelve in the morning, and as some of the witnesses say, in the afternoon also. The visits were most frequently made in the morning during a portion of the day usually devoted to professional visits. It should therefore excite no remark, that it occurred during the absence of the husband from home. The professional visits of physicians to the families of men of business are probably, in a great majority of cases, made when the father of the family is absent.

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The second ground of suspicion is, that there were repeated interviews between the defendant and Dr. Titsworth at her mother's house in the evening, that she was once or twice at his office, and that he accompanied her home on several occasions, her husband not being present. This occurred between Saturday, the first of September, 1860, when the complainant and his wife removed from his brother's house to his mother's, and Wednesday, the nineteenth of September, when the wife left her husband. The evidence upon this point is furnished by the testimony of Dominic Canatta, an intimate friend of the husband, who as he alleges, for his own satisfaction, sometimes alone, and sometimes in company with the husband, was engaged *in watching* the movements of the wife. This surveillance of the wife was instituted by the witness in consequence of information derived from the husband. There is no room for doubt, that all the facts within the knowledge of the witness were communicated to the husband, and yet the friendly relations of the husband and the doctor continued until after the wife had left her husband. If the conduct of the wife in this regard was not entirely satisfactory to the husband, and if she was not fully justified by the reasons which she assigns for it, which I do not propose to examine in detail, it is at least apparent that there was nothing in her conduct which furnished to the husband, or which can furnish to the court, any satisfactory evidence of her guilt. Every fact stated by the witness, except so far as it is contradicted or satisfactorily explained by other evidence, is quite consistent with the purity and innocence of the wife.

The third ground of suspicion is, examinations of, and operations upon the person of the wife, with electro magnetism and with instruments, in September, October, and November, 1859. The details of these operations have been introduced into the evidence for the purpose of showing that they were unnecessarily gross; being indecent liberties with the person of the defendant, and indicative of sensual feelings and purposes on the part of the physician, and that it was in

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fact, an attempt on the part of the defendant and the physician to procure an abortion. That the physician and the wife knew that she was pregnant. That it was probably the result of their illicit intercourse, and that they feared that the appearance of the child might furnish some evidence of its paternity. The two theories seem quite inconsistent. If the defendant was pregnant by the physician, if there is the least truth in the evidence of Mrs. Berckmans, that as early as June, 1859, the defendant and her physician were in the habit of adultery, it is scarcely credible that such extraordinary expedients would have been resorted to for the mere gratification of sensual feelings, or as a cover for indecent liberties. Nor do I think the other theory at all warranted by the evidence. The fact is, that the evidence upon this point was furnished by Dr. Titsworth himself. The nature of the operation appears by the charges upon his book of account, for the recovery of which a suit had been instituted, and a copy of the account filed with the justice. That account was in the hands of counsel, before and at the examination of the witness. These operations were all conducted at the request of the husband, and in his presence. This fact is expressly sworn to by the physician. If untrue, it might readily and effectually have been contradicted by the husband. The account given by the physician is, that he was first desired to ascertain whether the wife was pregnant, and that fact being ascertained, he was desired to produce an abortion. For the purpose of satisfying the parties, he used an instrument for the ostensible purpose of procuring an abortion, but without any real intention of producing that result. Whatever difficulties may lie in the way of accepting this as the true version of the transaction, they appear to me to be far less than those which must be encountered by adopting the theory of the complainant's counsel. If the doctor really wished to procure an abortion, why was it not effected? And if the wife consented, why was the husband's concurrence at all necessary? It may be added, that however immoral or unjustifiable the act may have been, the

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desire of the husband and wife that an abortion should be procured, does not appear at all incredible. The wife had very recently given birth to a child, and had endured great suffering during her confinement.

But the most significant of all the circumstances relied on as evidence of the wife's guilt, is the participation by Dr. Titsworth in her flight from the husband's house, his visiting her in New York, and his continued intercourse with her after her return.

There is little or no dispute as to the facts in relation to this part of the case. The real question is, as to the nature and motives of the flight of the wife, and the object with which the assistance was rendered. Was it the flight of an adulteress through the complicity of her paramour? Or the flight of a virtuous wife from the real or fancied wrongs of the husband, and was the assistance rendered through the mere promptings of friendly sympathy? The evidence clearly shows that alienation subsisted between the husband and wife, from causes unconnected entirely with the wife's relations with Dr. Titsworth. Of the long continued existence of these difficulties, whatever may have been their origin, there is no question. Of the discordant relations between the wife and the mother-in-law we have already spoken. It is obvious that the wife was very reluctant to return to live under the roof of the mother-in-law. She did return on Saturday, the first of September. On Sunday Mrs. Marsh, the mother of the wife, visited the daughter at the house of Mrs. Berckmans, the mother-in-law. She was ordered to leave the house, and on her refusal to do so, the husband, with the aid of two men who had been procured for the purpose, attempted to remove her by force. The wife interfered for her mother's protection. A violent struggle ensued, in the course of which the wife and the mother both received injuries, and the mother was compelled to leave the house. On Monday, the wife communicated to the doctor her intention of leaving her husband, if she could take her children with her. On Tuesday she consulted counsel, and repeated

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her desire to leave her husband. On Wednesday she requested the doctor to speak to a magistrate and an officer to help her away with her children, complaining that she was unable to stay any longer in the house, and that she was afraid of her life. At her request the magistrate was spoken to, a carriage procured, and the following note written to the wife:

WEDNESDAY, 4 P. M.

Mrs. B. I have seen Esq. R., and he thinks the better way for you is to go unprepared, that is, without making any disturbance or exciting alarm, and upon more mature reflection, I think myself that will be best and certainly the easiest. For instance, let Rickey take Gussie riding in his wagon, and when you are all ready, with your hoops well laden with children's clothing, &c., then tell Rickey to draw him to the front gate, and Hennie with Nina, quietly but quickly * * * the hot-house, down the walk, and all at one move get into a carriage all ready, and * * at Bonnell, taking the first by-street to place of destination. N. B. Don't have the children dressed different from common daily dress; if you do it will foil you. Put on as many dresses and clothing as you can each, and attach the children's clothing to skirts. Be assured this is your best and safest course. I will see Dr. Sherman or Mrs. S., and have them drive up and stop at Bonnell, after the first train arrives this P. M.; and then if E. is down town, as he frequently is, avail yourself of the opportunity and slip, and don't delay too long about your things, but go with them if you can, but without them if you can't. A Friend. In the margin was written: I must see you to night, it may be the last opportunity in a long while; don't fail. Let no one read this, and burn it immediately.

In accordance with this arrangement, the wife left her husband's home on the nineteenth of September. The doctor saw her before leaving Plainfield, prescribed, and gave medicine for her children who were sick. The wife went to New York with her children and remained there ten days, then returned to the house of a friend near Plainfield, then to her mother's house where she continued at the commencement

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of this suit. The doctor visited her twice in New York, as he testifies, at the request of the mother of the defendant, to see her sick children. He saw her again after her return, and continued to visit her up to the time of bringing the suit. The question is not whether the defendant left her husband for a justifiable cause, nor whether the doctor was justified in rendering the assistance he did. The simple inquiry is, whether the facts afford any evidence that the wife was guilty of adultery, and that the doctor was her paramour. I am clear that they furnish no evidence of adultery on the part of the wife, or of any guilty complicity on the part of Dr. Titsworth.

The arrangements for her departure, the consulting of counsel, the appeal to a magistrate, her manifest anxiety respecting her children, the general tone of the letter, are all I think utterly repugnant to the idea of the flight of an adulteress from the home of her husband, at the procurement or with the connivance of a paramour. The letter, the arrangements and circumstances of the transaction, afford convincing proof that the wife left the house of her husband, not as a criminal, but because she believed (whether right or wrong is immaterial) that she had justifiable cause for her departure. If it be conceded that the flight of the wife was without any justifiable cause, and the aid and counsel afforded by Dr. Titsworth an unwarrantable interference, it does not materially aid the complainant's case.

There are other facts in evidence, but they do not materially vary the aspect of the question. Evidence of a mother's errors or indiscretions can surely be no evidence of a daughter's guilt. Exposure to contagion is no proof of the existence of disease, though it may render its occurrence more probable. So exposure to moral contagion may render the existence of moral guilt more probable, but it will not justify the court in abating one jot of the evidence requisite to prove actual guilt. It is no province of an earthly tribunal to visit the iniquities of parents upon their children.

Nor is the conduct of Dr. Titsworth, as a witness before

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the magistrate, competent evidence of the wife's guilt. It was competent only as it tended to affect the credibility of his testimony. Parol evidence of the declarations of a *particeps criminis*, even though he had confessed his guilt, would not have been competent evidence against the defendant.

The case in some of its aspects is not free from difficulty, and my mind has not been free from doubt during the progress of the investigation, but after the most anxious consideration I feel that those doubts can only be safely resolved in favor of the defendant's innocence.

To establish the existence of adultery, the circumstances must be such as would lead the guarded discretion of a reasonable and just man to that conclusion. It must not be a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations. *2 Haggard C. R. 2; 2 Greenl. Ev., § 40; Bishop on M. & D., § 423.*

The facts proven must be such as cannot be reconciled with probability and the innocence of the parties. *Dailey v. Dailey, Wright's R. 514.*

Mere imprudence, indiscretion or folly, is not conclusive evidence of guilt. The mind of the court must be satisfied that there was an intimacy between the parties, entirely inconsistent with the duty which a virtuous wife owes to herself and to her husband.

Guided by these principles, I do not feel warranted in pronouncing the defendant guilty of adultery. While there is much in her conduct to regret and censure as indiscreet and ill advised, I do not find in the evidence satisfactory proof of guilt. Where the conduct of a party admits of two interpretations, equally consistent with probability, the one involving guilt and the other consistent with innocence, the rule of evidence as well as the dictates of justice, require that the interpretation should be favorable to innocence.

The burden of proof is upon the complainant, and it must be clear to justify the court in condemning a young wife to a life of dishonor, and her children to shame.

Every material circumstance relied on as presumptive evi-

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dence of guilt, appears to me equally susceptible of an interpretation consistent with probability and with innocence.

There is force as well as justice in the suggestion of counsel, that while each circumstance standing alone may admit of explanation and fail to command our belief of the defendant's guilt, yet the case is to be decided upon a view of all the facts combined, and that when they are grouped and presented in one view, they lead irresistibly to the conviction of the defendant's guilt. I have re-read and considered the evidence in that aspect, with all the care which the importance of the case demands. And while it may be admitted that there are grounds for doubt as to the innocence of the defendant, there are controlling circumstances which preclude a conviction of guilt, to which I will briefly advert.

At the very threshold of the inquiry we meet the significant fact, that the bill filed by the complainant in this cause is virtually a defensive measure. The defendant left her husband's house with two infant children, the eldest eighteen months old, a poor and almost friendless woman, on the nineteenth of September, 1860, and found shelter under her mother's roof. Within two months she filed her petition for a divorce, on the ground of her husband's cruelty. She applied for alimony, and exhibited proofs in support of the application. It was not until February of the following year that the husband awoke to a sense of his wife's guilt and his own wrongs, and filed his bill for relief. All the material facts of the case were within his knowledge before the wife had commenced proceedings against him. His mother had told him that she had with her own eyes witnessed the adulterous intercourse. He knew of the wife's visits to her mother, and of the company in which she returned to his house on several evenings previous to her flight. He had himself traced her movements with the assistance of his Italian friend. He knew of the physician's visits, both in Plainfield and in New York, and yet he forbore to take a step for the vindication of his injured honor. In the investigation of a wife's guilt, the conduct of the husband is al-

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ways regarded as a most significant circumstance, and one which cannot be lost sight of. So long as there is reasonable doubt of her guilt, or a plausible ground for a hope of her innocence, the husband's forbearance is both excusable and laudable. But when he holds in his hands what he claims to be satisfactory proofs of her guilt, his delay to prosecute is strong evidence in the wife's favor.

But the evidence furnished by the husband's conduct is not merely negative. There is, after the abandonment and return of the wife, the strongest direct evidence of his unshaken confidence in her virtue. It is proven that after the wife's return in October, when she went to his house to take away her things, that they had an interview, that he said he was sorry for what had happened, and that if she kept herself true to him they might live together after the affair was settled. True, this evidence comes from the lips of the wife, but it is not contradicted by the husband. It was a fact peculiarly within the knowledge of the parties themselves, and therefore, if untrue, eminently proper that he should have been called to contradict it. Is it possible that the husband who uttered that language could have believed his wife guilty? Does it not afford the strongest incidental proof of a fact which the evidence strongly favors, that the trouble between these parties has really been occasioned by the indiscretion and unwarranted interference of others?

Some of the evidence relied on as proof of criminal intercourse, points to a period of time when the wife was in the last stage of pregnancy; other portions of it to periods when she had just given birth to a child, during the period of her confinement or during severe illness, or the illness of her children, or when she was laboring under natural and severe mental anxiety; periods certainly when sensual indulgence would not be anticipated.

The evidence covers a period of four and a half years, extending from the marriage of the parties in February, 1858, down to the close of the testimony in 1862. It covers not only their entire married life, but the period of eighteen

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months during the pendency of the suit and the taking of the testimony. She has lived much of that time in the house, and under the eye of a mother-in-law who freely avows her suspicions and dislike of the defendant. She has been surrounded by servants. She has been watched by spies, and yet, exclusive of the two acts sworn to by the mother, and which have already been disposed of, there is evidence of no stolen interview; no private correspondence; no amorous or passionate utterance; no expression of affection; no licentious expression of lip or eye; no indecent familiarity; no personal freedom (aside from the performance of professional duties); no proximate act, leading up to the commission of the crime. I think it may be affirmed, however injudicious or indiscreet her conduct may be deemed, there is no one well authenticated act on the part of the defendant, inconsistent with the duty which a virtuous wife owes to herself and to her husband; no one which may not be reconciled with probability and with innocence. And yet the theory of the complainant is, that during months or years, the wife and her alleged paramour were pursuing a course of shameless adultery.

In order to prove adultery by circumstantial evidence, two points are to be ascertained and established; the opportunity for the crime, and the will to commit it. Where both are established, the court will infer the guilt. The radical difficulty with the complainant's evidence is, that while it establishes the one, it utterly fails to prove the other.

I cannot but think that the able and learned counsel of the complainant, in their conduct of the evidence and argument of the cause, felt the full pressure of this difficulty. Failing to prove a blemish in her reputation or a stain upon her virtue, they prove that her mother had been divorced, that the visits of her physician are too frequent and too long, and that, having no father, or brother, or friend, to whom she could have recourse, she resorted to that physician for counsel and guidance, when she was about to fly from her husband for his alleged cruelty.

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In view of the whole testimony, I feel constrained to say that I find no satisfactory evidence of the guilt of the defendant, and shall decree that the complainant's bill be dismissed.

NOTE. Decree unanimously affirmed by the Court of Appeals, at March Term, 1864.

ELBERT L. BURNHAM and wife *vs.* ROBERT DALLING.

In an attempted settlement by a guardian of his account, either under the act respecting the Orphans Court, *Nix. Dig.* 575, or under the act relative to guardians, *Nix. Dig.* 341, there must be a compliance with the requirements of the statute, to render the account exhibited by the guardian *prima facie* evidence of its correctness, and to impose upon the ward the burden of proving, or showing the falsity or injustice of any item of the account, to which he may afterwards take exceptions.

The case was heard upon bill and answer.

Gilchrist, for complainants.

The order of the Orphans Court was void, because not pursuant to the statute. *Gray v. Fox, Saxton* 260.

Also because no notice was given. *Nix. Dig.* 580, § 24; *Hess v. Cole*, 3 *Zab.* 116, 125; *Boulton v. Scott's Adm'r*, 2 *Green's Ch. R.* 231; *Fennimore v. Fennimore*, *Ibid.* 292.

Until final account, this court will treat accounts as open. *Merselis v. Ex'rs of Merselis*, 3 *Halst. Ch. R.* 573; *Exton v. Zule*, 1 *McCarter* 501.

Barkalow, for defendant. .

THE CHANCELLOR. The bill is filed by husband and wife against the guardian of the wife for a discovery and an account. William Bale, the father, died on the twenty-seventh of September, 1849, leaving three infant children, two of whom were under the age of fourteen years.

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The defendant was appointed guardian of the three children by the Orphans Court of Passaic county, in March, 1850. In October, 1853, during the minority of the wards and while they were living under his guardianship, the guardian filed his account in the surrogate's office of the county of Passaic, under oath, whereupon the following order was made:

PASSAIC ORPHANS COURT, October Term, 1853.

Robert Dalling, guardian of Elizabeth Bale, a minor under twenty-one years of age. } *Intermediate account.*

The surrogate having audited and stated the account of the above named guardian, and placed the same on the files of his office twenty days previous to this time, and being now reported for settlement, the same is in all things allowed as reported.

The only question submitted for decision is, whether this settlement can be regarded as *prima facie* evidence of the truth of the charges contained therein, so as to render it incumbent upon the ward to prove or show the falsity or injustice thereof.

It is admitted that no notice was given of the settlement by public advertisement, as was required by the statute, upon the settlement of the accounts of executors, administrators, guardians and trustees, in force at the date of the settlement.

Nor was any citation issued to the wards to appear at the said Orphans Court, as required by law. *Nix. Dig.* 580, § 24.

It is obvious that the attempted settlement of the guardian's accounts was not made in compliance with the requirements of the statute, and that the decree of allowance is nugatory and void, as against the wards.

Nor can the exhibition and filing of the account, and the allowance of it by the court, be of any avail against the ward under the provisions of the third section of the act relative to guardians. *Nix. Dig.* 341. The proceeding was not con-

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ducted in accordance with the requirement of that act. No notice by public advertisement or citation of the ward is required. The account is not to be audited or stated by the surrogate. No decree of allowance is to be made. There is in fact no settlement of the account within the meaning of the statutes directing and regulating the settlement of the accounts of trustees and guardians. The account of the guardian is to be exhibited under oath, to be examined by the court, or by such person or persons as they shall appoint, and being found and certified or reported to be properly and fairly stated, and the articles thereof to be supported and justified by the vouchers, and the report, in case of a reference, being approved and confirmed by the court, is, with such certificate or confirmation, to be entered of record in a book to be kept by the clerk for that purpose. It is obvious that the proceeding in the Orphans Court was not conducted in reference to these requirements. There is no certificate that the accounts were examined by the court, or that they were found to be properly and fairly stated, and the items thereof supported and justified by the vouchers. Nor is there any order directing it to be recorded. It is only a compliance with these requirements that renders the account thus exhibited by the guardian *prima facie* evidence of its correctness, and imposes upon the ward the burden of proving or showing the falsity or injustice of any item of the account to which he may afterwards take exceptions.

In taking and stating the accounts of the guardian, the attempted settlement in the Orphans Court not having been made as required by law, cannot be regarded as presumptive, and much less as conclusive evidence of the truth of any of the charges contained therein.

From the view which has been taken of the case, it is unnecessary to express any opinion upon the question suggested upon the argument, how far any settlement made by a guardian of his accounts during the minority of his wards and the continuance of his guardianship, will be regarded in a court of equity as binding upon the infants.

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GARRET R. HOPPER *vs.* JOHN I. HOPPER.

- For the sale of land*
1. Where a contract is certain and fair in all its parts, and for an adequate consideration, and the party seeking its enforcement has held himself ready to perform according to its terms without default on his part and has been diligent in his application for relief, a court of equity will decree a specific performance of the contract, as a matter of course.
 2. It constitutes no objection to a decree for specific performance, that the application is made to enforce the *payment of the purchase money*, and not to compel a delivery of the title.
 3. The doctrine is well established that the remedy is *mutual*, and that the vendor may maintain his bill in all cases where the purchaser could sue for a specific performance of the agreement.
 4. Mere pecuniary inability to fulfill an engagement does not discharge the obligation of the contract, nor does it constitute any defence to a decree for specific performance.
 5. Where the contract is not capable of being performed by reason of some difficulty inherent in the subject matter of the contract, a specific performance will not be decreed.
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The case was heard upon the pleadings and proofs.

C. H. Voorhis, for complainant.

Woodruff, for defendant.

Wm. J. Green
THE CHANCELLOR. The bill is filed by a vendor to enforce the specific performance of a contract for the purchase and sale of real estate. The contract is in writing, and bears date on the tenth of June, 1862. By the terms of the contract, the complainant agreed to convey to the defendant a tract of land containing sixty acres, more or less, for the consideration of \$3600, five hundred dollars to be paid in cash on the fifteenth day of July then next, and \$3100, the balance of the purchase money, to be secured by bond and mortgage, payable on the first of May then next, with interest from the first day of November.

The contract is certain and fair in all its parts, and is for

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an adequate consideration. The complainant was in no default upon his part. He proffered himself ready and willing to perform the contract, according to its terms. He tendered a deed and the possession of the premises. He made prompt application for relief by filing his bill in this court. Under such circumstances it is as much a matter of course for courts of equity to decree a specific performance of the contract as it is for a court of law to give damages for the breach of it.) *Hall v. Warren*, 9 Vesey 608; *Greenaway v. Adams*, 12 Vesey 395, 400; 1 Story's *Eq. Jur.*, § 751, § 771.

It constitutes no objection to the relief prayed for, that the application is made by the vendor to enforce the payment of the purchase money, and not by the vendee to compel a delivery of the title. The vendor has not a complete remedy at law. Pecuniary damages for the breach of the contract is not what the complainant asks, or is entitled to receive at the hands of a court of equity. He asks to receive the price stipulated to be paid in lieu of the land. The doctrine is well established that the remedy is mutual, and that the vendor may maintain his bill in all cases where the purchaser could sue for a specific performance of the agreement. *Lewis v. Lord Lechmere*, 10 Mod. 503; *Walker v. Eastern Counties Railway Co.*, 6 Hare 594; *Fry on Spec. Perf.*, § 23.

The only ground of defence suggested by the answer or by the evidence, is the inability of the defendant to perform the contract by making payment of the \$500, agreed to be paid on the fifteenth of July. The allegation is, that he entered into the agreement in good faith, expecting to get the money from his wife to make the payment on the contract. That he soon after ascertained that his wife would not let him have the money. That he had it not himself and was unable to get it of any one else, and was therefore unable to comply with his agreement. It appears from the evidence that the wife was aware of the husband's intention to make the purchase, that she, with her husband, visited and examined the premises, and that the final arrangement for the execution of the contract was made in her presence and with her approbation. If the wife afterwards changed her mind

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refused to advance the funds to aid in making the purchase, there are strong reasons for believing that it was at the husband's instance and procurement. But if the fact be otherwise, and the truth be as alleged in the answer, that the wife refused to advance the money and the husband was unable to procure it elsewhere, it constitutes no defence to the bill. The case made by the answer is simply inability on the part of the defendant to meet his engagement. Whether he relied, at the time of making the contract, upon obtaining the means of fulfilling it from his wife's property, or from a third party, or from his own resources, can make no difference. Mere pecuniary inability to fulfill an engagement does not discharge the obligation of the contract, nor does it constitute any defence, either at law or in equity, to a decree for performance. The complainant is entitled to his decree. Whether the defendant will be able to satisfy the claim or to perform the decree, will be ascertained hereafter. Where the contract is not capable of being performed by reason of some difficulty inherent in the subject matter of the contract, as where the title of the grantor to the thing to be conveyed fails, a specific performance will not be decreed. The court will not make an order obviously nugatory. But this is not to be confounded with alleged or actual inability on the part of the contracting party from want of pecuniary means to fulfill his engagement.

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Nor is the case exposed to the objection which lies to a decree for the specific performance of a contract made by a husband to convey land, the title to which is in the wife, or which is subject to her dower. There the very strong objection exists that the decree of the court lays the strongest constraint upon the wife to part with the title to her land, which the wisdom of the law has declared shall not be aliened without her free and voluntary consent. The decree of the court cannot be executed without the wife parts with the title to her land. It operates *ex-necessitate* as a constraint upon the freedom of her will. 1 Story's Eq. Jur., § 731, 734; *Young v. Paul*, 2 Stockt. 401.

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But in the present case no such necessity exists. There is no moral impossibility of the husband's executing the contract without the aid of the wife. If she will not furnish the means, he may procure it elsewhere.

The complainant is entitled to a decree.

THE MORRIS COUNTY BANK vs. THE ROCKAWAY MANUFACTURING COMPANY.

1. A *lien claim* filed upon separate buildings and upon distinct lots of land, without apportioning the claim and designating specifically the amount claimed upon each, is not a compliance with the statute (*N.J. Dig.* 524), and must be postponed to the claims of other encumbrancers.
 2. Nor does it remedy the objection, that it appears by the evidence that the claim may be apportioned between the different buildings in proportion to the value of the materials used in the construction of each of them.
 3. A claim, not filed according to the requirements of the statute, constitutes no encumbrance upon the premises.
 4. A *judgment at law* entered upon the lien, the lien claim not having been filed pursuant to the statute, gives it no priority in payment, nor any advantage over liens upon which judgment has not been rendered.
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The bill in this cause was filed to foreclose two mortgages on certain real estate of the Rockaway Manufacturing Company. The main controversy was in regard to the validity and priority of sundry lien claims for labor and materials furnished in the erection and repairing of certain buildings on the mortgaged premises. An opinion was delivered at February Term, 1862.* But the mind of the court being in doubt, as to whether, under our statute, a lien claim could be filed to include several buildings, or buildings standing upon distinct lots of ground, without specifying what portion of the debt is claimed as a lien upon each building, the Chancellor reserved his opinion upon that question, and ordered

* 1 *McCarter* 189.

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a reference to a master to ascertain and report the amount and priority of the respective claims and encumbrances, and to report more definitely the situation of the different buildings, the manner of using the same, and the proportion of labor and materials furnished by the several lien claimants for the respective buildings.

The master's report, made in pursuance of the decretal order, is as follows:

In pursuance of a decretal order of this court made in the above cause, and bearing date on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, by which it was, among other things, ordered, adjudged, and decreed, that it be referred to the subscriber, one of the masters of said court, to ascertain and report the full amount due to the defendant, John I. Blair, and to the complainants on their several mortgages in said order referred to; also, the amount due to the defendant, Julius Decasse and the other claimants mentioned in said order and in the pleadings in said cause, whether by judgment or mechanics liens; and whereby also, the said master was directed to inquire the relative value of the steel furnace and buildings, whereon said Julius Decasse claims a specific lien, and of the undivided half of the steel furnace tract, claimed as the curtilage thereof, on the one hand, and of the other undivided half of the steel furnace tract and the other buildings thereon, on the other; and whereby also, the said master was directed to ascertain and report to the court the situation of the different properties, mills, furnaces, and buildings embraced within and upon the said rolling mill tract and steel furnace tract, and the manner of using the same, whether as separate properties or factories, or as one factory and establishment, and also in what manner and proportion the several lien claimants have furnished labor or materials for the several properties, buildings, &c.; and that the said master do make a separate report in reference to said matters, &c.

I do respectfully report to the Chancellor that I have been attended by the solicitor of the complainants and also by the

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solicitors of several of the defendants in said cause, and that I have taken the depositions of witnesses in reference to the several matters so referred to me, which depositions are hereto annexed, and after hearing and considering the evidence taken before me, and also examining the evidence heretofore taken in this cause and the exhibits made therein, I do respectfully report, that there is due to the defendant, John I. Blair, at the date hereof, for principal and interest on his said bond and mortgage mentioned in said order, and which have been presented and offered in evidence before me in his behalf, and have been marked by me *Exhibits A* and *B*, the sum of \$2870.66, as will more fully and particularly appear by reference to *Schedule A*, hereto annexed, which I desire to be considered as a part of this report. I do further report, that there is due to the complainants at the date hereof, for principal and interest on the bond and mortgage held by them, made by Freeman Wood and wife to Theodore T. Wood, heretofore offered in evidence in this cause, and marked *Exhibits W 1* and *W 2*, the sum of \$29,793.33, as will more particularly appear by reference to *Schedule B*, hereto annexed, which I also desire to be taken as a part of my report. I do further report, that there is due to the complainants, at the date hereof, for principal and interest on the mortgage given by The Rockaway Manufacturing Company to the complainants, bearing date on the twenty-second day of February, 1856, heretofore offered in evidence in this cause, and marked as *Exhibit W 4*, on the part of the complainants, the sum of \$35,438.93, as will more fully and particularly appear by reference to *Schedule C*, hereto annexed. I do further report, that there is due to the defendant, Julius Decasse, on the lien claimed by him in his answer filed in this cause, for principal and interest at the date hereof, the sum of \$4954.97, as will more fully appear by *Schedule D*, hereto annexed. And I do further report, that although depositions have been taken at the instance of the complainants, as to what is the proper and necessary curtilage to the steel furnace, on which the said Julius Decasse claims a lien, I have not regarded that

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part of said order of reference which directed me to report in what manner and proportion the several lien claimants have furnished labor or materials for the said several properties and buildings, as applying to the said claim of said Decasse, but have regarded said order as sustaining his said claim of lien as made by him. I do further report, that there is due at the date hereof to the defendant, Freeman Wood, upon the judgment recovered by him against The Rockaway Manufacturing Company, in the Circuit Court of the county of Morris, on the twenty-sixth day of October, 1857, of which judgment an exhibit was heretofore made in this cause (marked *Exhibit C 29*) the sum of \$3489.98, as will more fully appear by reference to *Schedule E*, hereto annexed, and made a part of this report. And I do further report, that said Freeman Wood furnished materials for the steel furnace, mentioned in said order, to the amount of \$1528.25, and for the rolling mill to the amount of \$4862.76, upon which demands generally various payments were made by The Rockaway Manufacturing Company, and said payments were credited generally upon said account, and that said judgment was obtained by said Freeman Wood for a general balance due to him on said account. And I do further report, that in my opinion it is just and equitable that the judgment of said Freeman Wood should be paid out of the proceeds of sale of the said rolling mill and steel furnace property in the same proportion as he originally furnished materials for said respective properties, and claimed liens thereon, and that therefore the sum of \$834.54 should be considered a lien on the steel furnace property, and be paid out of the proceeds of the sale thereof; and the sum of \$3489.98 should be considered as a lien upon the rolling mill property and paid out of the proceeds of the sale thereof. I do further report, that there is due at the date hereof, to the defendant, Stephen Lyon, upon the judgment recovered by him against The Rockaway Manufacturing Company, as his claim of lien in the Circuit Court of the said county of Morris, on the twenty-fifth day of September, 1856, the sum of \$616.57, as will

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more fully appear by reference to *Schedule F*, hereto annexed, and made a part of this report. And I do further report in reference to said claim, that it appears by the claim of lien made an exhibit in this cause by said defendant, that the whole amount of labor done and performed by him for The Rockaway Manufacturing Company, at the said steel furnace and at the said rolling mill, amounted to \$1109.47; that several payments were made to him and credited generally on his said account, and his judgment was recovered for the general balance due him on said account; and that it does not appear from said lien claim of which an exhibit was heretofore made in this cause, nor can I ascertain from the evidence heretofore taken, or from the depositions taken before me and hereto annexed, with any degree of certainty, what proportion of the amount still remaining due to said claimant, as herein before reported, is due for labor done and performed at the rolling mill, and what proportion for labor done and performed by the said claimant at the steel furnace building. I do further report, that there is due at the date hereof, to the defendant, Eliphalet Sturtevant, upon the judgment by him obtained on the seventeenth day of November, 1856, against The Rockaway Manufacturing Company in the Circuit Court of the county of Morris, of which an exhibit has been heretofore made, the sum of \$291.40, as will more fully appear by reference to *Schedule G*, hereto annexed, and made a part of this report. And I do further report in reference to said claim, that the labor and materials composing it were furnished for, and done and used at the rolling mill property. I do further report, that there is due to Cummins McCarty, another of said lien claimants, on his judgment obtained against The Rockaway Manufacturing Company in the Morris Circuit Court, on the twenty-second day of October, 1857, and heretofore made an exhibit in this cause, the sum of \$1082.88, as will more particularly appear by reference to *Schedule H*, hereto annexed. And I do further report in reference to said claim, that the materials constituting the same were furnished for and used at the building known as

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the rolling mill property. And I do further report, that there is due to James H. Bruen, another of said lien claimants, at the date hereof, on two judgments recovered by him in the Morris Circuit Court against The Rockaway Manufacturing Company, on the seventeenth day of November, 1857, of which exhibits have been heretofore made in this cause, the sum of \$1830.26, as will more fully appear by reference to *Schedule I*, hereto annexed. And I do further report as to said claimant, that the sum of \$1568.77, being the amount due on one of said judgments, is for labor done and materials furnished by the said claimant for the rolling mill property, and the sum of \$261.49, the amount of the other judgment, is for labor done by said claimant and materials furnished by him for the steel furnace property. I do further report, that there is due at the date hereof to the claimants, William R. Sayre and Marcus Sayre, on their claim of lien, the sum of \$1745.66, as will more fully appear by reference to *Schedule K*, hereto annexed. And I do further report in reference to said claim, that I am unable to ascertain, either from said lien claim heretofore made an exhibit in this cause, or from the evidence offered by said claimants, what proportion of said materials mentioned in said claim were furnished and provided for or used at the steel furnace. I do further report, that there is due as the date hereof to Jacob L. Fichter, on his judgment obtained in the Supreme Court against The Rockaway Manufacturing Company, on the twenty-sixth day of June, 1856, the sum of \$3129.47, as will appear by *Schedule L*, hereto annexed. I do further, in pursuance of the directions contained in said order of reference, respectfully report, that in my judgment, founded on the depositions taken before me and hereto annexed, "the relative value of the steel furnace and buildings, whereon the said Julius Decasse claims a specific lien, and of the undivided half of the steel furnace tract claimed as the curtilage thereof on the one hand, and of the other undivided half of said tract on the other," (there being no buildings on said tract) is five to one, that is to say, that the value of the steel furnace and buildings, on which

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said lien is claimed, together with one half of the land described in said lien claim, claimed as the curtilage thereof, five times the value of the undivided half of said tract. I do however further respectfully report, that the tract or lot mentioned in said order of reference as lot No. 3, on which said steel furnace is said by said order to stand, and which was sold by me as herein before reported, for the sum of \$3050, embraces not only the steel furnace, the steel furnace building, and the land on which they stand, and which, in and by said lien claim of said Julius Decasse, is claimed as the curtilage thereto, but also the dwelling-house and lot specially excepted in said lien claim, and a lot of about half an acre lying on the west side of the road mentioned in said lien claim, as will more fully appear by a comparison of said lien claim with a diagram of the premises marked as *Exhibit* —, on the part of complainants. And I do further report, that in my opinion, based on the depositions taken before me valuing the whole of said lot No. 3 at the sum of \$3050, the amount realized therefor at public sale, the sum of \$697.14 is the proportion or part thereof which would represent the value of said dwelling-house and lot, and said lot on the west side of the road, leaving the sum of \$2352.86 as the part of said proceeds of the sale of said lot No. 3 arising from that part thereof embraced in the said lien claim of said Julius Decasse. In obedience to that part of said order of reference directing me to "ascertain and report to the court the situation of the different properties, mills, furnaces, and buildings embraced within and upon the said rolling mill tract and steel furnace tract, and the manner of using the same, whether as separate properties or factories or as one factory and establishment," I do further respectfully report, that the said rolling mill tract and the said steel furnace tract are separate and distinct tracts, lying about one eighth of a mile from each other, and separated entirely by the land of a third person, though for many years past they have been owned by the same owner. The buildings upon the rolling mill tract are situated the rolling mi

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forge, coal-house, blacksmith shop, and the building used as an office ; and on the steel furnace tract are situated the steel furnace, the steel furnace dwelling-house, so called, and the canal basin and dock. That the business carried on at the rolling mill and forge has no necessary connection with that carried on at the steel furnace, and in point of fact until The Rockaway Manufacturing Company purchased said premises, the business carried on on the two tracts, though conducted by the same owner, was kept entirely separate and distinct, except that the dock was used for the convenience of both tracts, as it was also used for landing and shipping freight for other persons in the neighborhood, as other canal docks were used. That so far as appears, since the premises were purchased by The Rockaway Manufacturing Company, the whole have been regarded as one establishment and used as such, though the steel furnace was used to a very limited extent, and was not completed when the company failed.

All which is respectfully submitted.

THEO. LITTLE, *Master, &c.*

Dated January, 3d, 1863.

The case is now heard upon a motion to confirm the master's report.

Chandler, for complainants.

Keasbey, for Decasse.

McDonald, for Sayre.

THE CHANCELLOR. The case is not essentially changed in any of its material aspects, touching the rights of the lien-holders, by the evidence adduced before the master.

The master reports that the rolling mill tract and the steel furnace tract are separate and distinct tracts, lying about one eighth of a mile from each other, and separated entirely by the land of a third person, though for many years past

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they have been owned by the same owner. That upon the rolling mill tract are situated the rolling mill, forge, coal-house, blacksmith's shop, and the building used as an office; and on the steel furnace tract are situated the steel furnace, the steel furnace dwelling-house, and the canal basin and dock.

The lien claim of Sayre describes the three principal buildings on the rolling mill tract and one building on the steel furnace tract, and claims a lien upon all the buildings upon both tracts, but without apportioning his claim, or specifying the amount of materials furnished for each building, or for the buildings upon each separate tract.

The question is thus distinctly presented, whether a lien claim, purporting to be filed under the provisions of the statute, including several separate buildings erected upon separate and distinct pieces of land, is a valid claim and within the requirements of the law.

I do not see upon what principle the claim can be sustained, if any regard be had to the letter, spirit, or policy of the act, to the rights of the land owner, or to the just claims of other encumbrancers. The arguments by which the claim is sought to be sustained, if their validity be admitted, will not permit the court to stop short of declaring that the claims of this highly favored and meritorious class of creditors, is of so high a character that it attaches at once to all the real estate of the land owner, whatsoever and wheresoever it may be. The real design of the law will be most effectually attained by a faithful observance of its plain provisions. The statute in terms restricts the lien to the building, for the erection and construction of which the work was done or the materials furnished, and to the land on which the same is erected. The first section of the act declares that every building shall be liable for the payment of any debt contracted and owing for labor performed, or materials furnished, for the erection and construction thereof, which debt shall be a lien on *such building*, and on the land whereon it stands, including the lot or curtilage whereon the same is erected. *Nix. Dig. 524.*

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Almost every provision of the statute embodies the same idea. It limits the lien to the building, for the erection and construction of which the debt was contracted, and the land whereon it stands. The idea appears to be inseparably interwoven with the whole fabric and texture of the statute. The policy of the law rests upon the same idea, *viz.* to recompense the mechanic or materialman the value of the work done, or materials furnished, in the construction of the building whose value he has contributed to increase. And in the French law, the architects, masons, and others employed in building, are privileged creditors only to the amount of the increased value resulting from the work which they have done. *Code Napoleon, Art. 2103.*

It appears to me that the insuperable objection to permitting a lien for materials furnished for several buildings to be included in one claim, with no specification of the amount furnished for each, is, that it enables the lienholder to shift the encumbrance at his pleasure, and to place the bulk of the claim upon any building, to an amount far exceeding the value contributed to such building, in contravention of the plain terms and manifest policy of the statute, and in derogation of the rights of other parties. If the property all continued in the hands of the same owner, the practical effect of such practice, though it might prove embarrassing, might not be either unjust or oppressive. But when it is borne in mind that in most cases, as in the present, where there is a contest for priority of encumbrances, the original owner is insolvent or not interested in the result, and that the contest is between the lienholders themselves, or between them and equally meritorious classes of creditors, it is difficult to see how the practice can be permitted, consistently with law or with justice. The phraseology of the early lien law of Pennsylvania, passed on the seventeenth of March, 1806, was by no means so explicit and unequivocal as our present law. An attempt was made under the provisions of that act to fix a joint lien upon three houses, built at the same time by the same agent, though owned by different persons. Chief

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Justice Tilghman, in delivering the opinion of the court, said: "The expressions in this act of assembly are so far from being clear in favor of a *joint lien* that they must be twisted and tortured to make them bear the appearance of it." He refused so to construe the act, and held that the joint claim was unauthorized, and consequently there never was a lien. *Gorgas v. Douglas*, 6 Serg. & R. 512. The opinion was confined in terms to the case of a lien upon several houses owned by several persons, though most of the reasoning of the eminent judge will be found equally applicable to the case of several houses owned by the same person. The question gave rise to much conflict of opinion. It was subsequently held in *Pennock v. Hoover*, 5 Rawle 291, that where the *adjoining* buildings were owned by different persons, and erected under a general request, the mechanic or materialman might file his claim against all the houses jointly, or he might apportion it among them and file a separate claim. The legislature, by the act of 1831, to remove the doubts which existed touching the construction of the law, authorized a joint lien to be filed by the materialman on *adjoining* buildings. But the inconveniences, not to say the consequent injustice of the practice, was such that the legislature, by the act of 1836, required the materialman who files a joint lien upon several buildings, to specify the amount which he claims to be due on each building, or in default thereof his claim should be postponed to other lien creditors. The provisions of the last act were applied and enforced in *Thomas v. James*, 7 Watts & Serg. 381.

The plain language of our statute is too clear to admit of being (in the emphatic language of Chief Justice Tilghman) thus twisted and tortured. And if it would admit of it, the experience of our sister state may serve as a warning against suffering judicial construction, even in pursuit of a fancied good, to move in advance of clear legislative enactment. But the filing of a joint lien, both by judicial construction and express legislation in Pennsylvania, has been limited to *adjoining* houses erected *together* upon the same block. It has

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never been extended to separate blocks; and a lien filed against distinct blocks of buildings separated by streets, is held null and void upon its face. *Young v. Chambers*, 3 *Harris* 267; *Goepp v. Garterer*, 11 *Casey* 130.

A claim filed upon separate buildings and upon distinct lots of land, without apportioning the claim and designating specifically the amount claimed upon each, is not a compliance with the statute, and must be postponed to the claims of other encumbrancers. The case does not call for the decision of the question, whether the lien would have been valid if all these buildings had been upon the same tract, and no decisive opinion is intended to be expressed upon that point. It was stated upon the argument, that that question has been passed upon by the Chief Justice, and other Justices of the Supreme Court at the Circuits. I apprehend it will be found that those decisions apply only to the cases where the buildings are within the same curtilage, and mere appurtenances of the main building, so that a lien upon the main building would of necessity include the others. But I purpose hazarding no opinion which may conflict with any deliberately expressed opinion of the Justices of the Supreme Court; regarding it as highly important, that upon the construction of a statute so widely operative, practitioners should not be embarrassed, and the rights of parties prejudiced by conflicting judicial opinions.

The lien claims of Freeman Wood and of Stephen Lyon, are not among the papers placed in the hands of the court. It was, however, stated upon the argument and understood to be admitted, that they are both joint liens upon different buildings upon both lots, and are open to the same objection as Sayres' claim. The objection is not remedied by the fact reported by the master in regard to one of the claims, that by the evidence he is enabled to apportion the claim between the different buildings in proportion to the value of the materials used in the construction of each of them. The radical objection is that the claim was not filed according to the requirement of the statute, and constitutes, therefore,

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under the provisions of the law, no encumbrance upon the premises. Nor does the fact that judgment at law is entered upon the lien—the lien claim not having been filed pursuant to the statute—give it any priority in payment, or advantage over liens upon which judgment has not been rendered. The order of priority of the encumbrances is in no wise affected by the judgment to enforce the lien.

MARIA ANSHUTZ vs. PHILIP J. ANSHUTZ.

1. This court has *original jurisdiction* in the matter of alimony, *only* where the husband without any justifiable cause abandons his wife, or separates himself from her, or refuses and neglects to maintain and provide for her.
 2. The abandonment or separation on the part of the husband, as well as the refusal to support the wife, must be charged in the bill and be sustained by the proof.
 3. The court will not grant a writ of *ne exeat* against the husband, or an injunction to restrain him from alienating his property, upon the *mere apprehension* of an abandonment.
 4. There may be a *constructive abandonment* or separation, while the parties continue under the same roof.
 5. While the parties continue to live together, no measure of unkind or harsh treatment, which will not constitute valid ground for a divorce, will entitle the wife to alimony.
 6. A bill for alimony independent of the statute, except as incidental to some other relief which may give the court jurisdiction, will not be entertained.
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On motion to dissolve the injunction, and to set aside the writ of *ne exeat*.

Parker, for motion, cited 2 *Story's Eq. Jur.*, § 1422; *Nix. Dig.* 224, § 10; *Yule v. Yule*, 2 *Stockt.* 138; *Denton v. Denton*, 1 *Johns. Ch. R.* 364, 441; *Parker v. Parker*, 1 *Beas.* 105.



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Runyon, contra, cited 2 Story's Eq. Jur., § 1423; Miller v. Miller, Saxton 386.

THE CHANCELLOR. The bill is filed by a wife against her husband for alimony, for the support and maintenance of herself and her children. On filing the bill, a writ of *ne exeat* issued against the husband; and also an injunction to restrain him from removing his children, or from conveying away or disposing of his farm or other property.

The defendant having answered the bill, moves to set aside the writ of *ne exeat* and to dissolve the injunction.

The bill is filed solely for alimony. It is not asked for as incidental to any other relief. The first ground relied on in support of the motion is, that there is no equity in the bill, and that the case made does not justify a decree for alimony. The only case where the statute confers upon this court original jurisdiction in matters of alimony is where the husband, without any justifiable cause, abandons his wife or separates himself from her, or refuses and neglects to maintain and provide for her. *Nix. Dig.* 224, § 10.

The terms of the statute are too clear and explicit to admit of doubt, or to leave room for latitude of interpretation. There must be an abandonment of the wife, or separation from her without justifiable cause, and an omission to suitably maintain and provide for her, and the abandonment or separation on the part of the husband, as well as the refusal to support the wife, must be charged in the bill and be sustained by the proof. I had occasion to examine this question in the recent case of *Ware v. Ware*, and I was then satisfied, as I still am, that nothing short of an abandonment or separation will warrant the interference of the court. The decree in that case was opened mainly on the ground that the fact was not distinctly charged in the bill, nor satisfactorily established by the evidence. There may be an abandonment or separation within the sound construction of the act, while the parties continue under the same roof; as where the husband utterly refuses to have any



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intercourse with his wife, or to make any provision for her maintenance. He may seclude himself in a portion of his house and take his meals alone, or board elsewhere than in his house, and thus as effectually separate himself from her and refuse to provide for her, as in case of an actual abandonment. But in whatever form it may exist, there must be an abandonment or separation by the husband from the wife. There is no such charge in the bill, nor in fact any charge that the husband refuses to maintain and provide for her. The material allegations of the bill are, that for as much as a year past the husband, without just cause or provocation, has been in the habit of treating her unkindly and addressing her with violent, insulting, threatening, and exceedingly profane language, and also refusing to provide the complainant and her children with such necessary clothing as to enable them to appear respectably, although possessed of abundant means for the purpose; and that for much of the time this last winter he has refused to speak to her and even to answer her when she addressed him; that during the last two or three months, she has been apprehensive of personal violence at his hands, and he is now, as the complainant has every reason to believe, and does believe, concluding his preparations to absolutely abandon her and her children, and to leave her and them without support, or the means thereof, and that he designs quickly to depart out of this state, with that view and for that purpose.

It is obvious that none of these charges bring the case within the purview of the statute. While the parties continue to live together no measure of unkind or harsh treatment, which will not constitute valid ground for a divorce, will entitle the wife to alimony.

There is no allegation of a neglect or refusal to support and maintain the wife. All the allegation in that behalf is, that he does not provide the complainant and her children such necessary clothing as to enable them to appear respectably. The case made by the bill is not within the provisions of the statute.

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Nor will this court entertain a bill for alimony independent of the statute, except as incidental to some other relief which may give the court jurisdiction. Such was clearly the view of the master in *Miller v. Miller*, *Saxton* 386.

In *Yule v. Yule*, 2 *Stockt.* 138, Chancellor Williamson decided that, as a matter of principle, the court ought not, except in cases authorized by the statute, to decree alimony unless as incident to a decree for divorce.

And in *Corey v. Corey*, 3 *Stockt.* 400, the Chancellor, though he regarded it as unnecessary for the purposes of that case to decide the question, explicitly states that, as the law has been considered in this state, the power of the court to grant relief is confined to the cases mentioned in the statute. In that case, relief was granted on the ground that the husband persisted in continuing a separation, of which the wife was the original cause, and that he neglected to provide for her a suitable support and maintenance. There was an actual separation and a failure to support the wife, which brought the case directly within the terms of the statute.

All the reported cases will, I think, be found to be brought within the statutory provisions; the bill charging an abandonment or separation by the act of the husband, without justifiable cause, and a neglect to provide for the wife.

The original jurisdiction of courts of equity to grant alimony as an independent ground of relief, is by no means clearly established. And where the authority is insisted upon, no broader grounds of relief appear to be relied upon than those presented by the statute of this state. 2 *Story's Eq.*, § 1422, 1423, a.

But it is urged that although no abandonment or separation has actually taken place, yet where the facts and circumstances show that there is a well grounded apprehension that the husband is about to abandon his wife, to dispose of his property, and to remove beyond the jurisdiction of the state, the court will interfere to prevent it. The bill is manifestly framed with a view to relief in this form, and it was mainly upon this ground that the writs of *ne exeat* and injunction

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were issued. But upon reflection, I do not perceive upon what principle this exercise of the power of the court can be sustained. The court has no power to compel the parties to live together or to restrain a separation. The wife has no right to the interference of the court for her maintenance until the abandonment or separation has taken place. The writs were not issued to protect any subsisting right or interest of the wife, but on the mere ground of apprehension on the part of the wife that a right might thereafter be created which would entitle her to protection. If the writs are continued and the husband thereby prevented from leaving the state or disposing of his property, it is clear that the wife cannot have a perpetual injunction or any other relief upon the merits of her case. The case made by the bill affords no ground for the interference of the court.

If the case, as presented by the complainant's bill, could admit of any doubt, it would be effectually dispelled by the answer. It fully and explicitly denies all intention or purpose on the part of the defendant, of abandoning his wife or of failing to furnish her support and maintenance. And while it admits many of the facts and allegations contained in the bill, it shows that they are clearly reconcilable with his rights and duties as a husband and a father, and exhibits in a strong and clear light the danger and inexpediency on the mere ground of apprehended wrong, of any interference with the exercise of the rights of the husband to control and manage his affairs as shall appear to himself best and most for his own interest.

The injunction must be dissolved, the writ of *ne exeat* discharged, and the bill dismissed. The decree will be made without costs as against the wife.

Hutcheson et als. v. Peshine et als.

JOHN A. HUTCHESON and others *vs.* JOHN S. PESHINE and others.

An insolvent debtor having been arrested in Virginia, and being in custody by virtue of a *capias ad satisfaciendum*, petitioned for his discharge under the insolvent laws of that state, and having taken the oath of insolvency, and tendered and subscribed a schedule of all his property, real and personal, did further, in pursuance of the requirements of the insolvent laws of said state, and in order to his discharge as an insolvent, execute and deliver to the sheriff, by whom he was held in custody, a deed for certain real estate in New Jersey, described in said schedule. Upon a bill filed in this court to compel the execution of the trusts upon which the said deed was executed, *Held*—

1. That a general assignment by a debtor, of all his real and personal property, under the insolvent laws of Virginia or of any other state, can pass no title to real estate in New Jersey.
 2. The deed to the sheriff, though absolute upon its face, was merely *ancillary* to the general assignment, burdened with the same trusts, and designed to carry the assignment into effect. Independent of those trusts, and of the provisions of the statutes of insolvency, the deed is without consideration and void.
 3. The deed is not merely fraudulent as against subsequent creditors, but it is illegal and inoperative as a transfer of title to real estate, and the trusts under it will neither be recognized nor executed by the courts of this state.
 4. This court will not administer trust funds created under the laws of another state, and growing out of the sale of real estate situate in New Jersey, in direct conflict with the laws of this state, to the prejudice of creditors residing here.
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The bill charges that John S. Peshine, one of the defendants, having been arrested upon a *capias ad satisfaciendum*, issued out of the Circuit Court of Henrico county, Virginia, upon a judgment recovered by Elisha Shipperson, for \$10,000, and being in custody by virtue of the said writ, on the twenty-fourth of March, 1860, in pursuance of the provision of certain statutes of the state of Virginia, set out in the complainant's bill, petitioned for his discharge under the insolvent laws of that state, and having taken the oath of insolvency, and tendered and subscribed a schedule of all his

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property, real and personal, (as required by law), did further, in pursuance of the requirements of the said insolvent laws, and in order to his discharge as an insolvent, execute and deliver to John A. Hutcheson, the sheriff by whom he was held in custody, a deed for certain real estate in New Jersey, described in the said schedule of his real and personal estate.

The bill further charges, that the deed thus made by Peshine to Hutcheson was executed, acknowledged and recorded in the clerk's office of the county of Essex, according to the laws of this state, and that by virtue of the laws of Virginia, and by force and effect of the said deed, the said Hutcheson became seized of the lands and premises thereby conveyed, subject to legal prior encumbrances, in trust to sell and dispose of the same, or of so much thereof as may be necessary, and to apply the proceeds, after satisfying what may be found due upon such prior encumbrances, to the payment of the judgment recovered by Shipperson, upon which the writ of *capias ad satisfaciendum* was issued, and to refund to Peshine any surplus of said proceeds which may thereafter remain. That by the judicial construction given by the laws of Virginia to the statutes under which the said deed was executed, the sheriff, by virtue of the said conveyance, became the trustee of the premises thereby conveyed for the creditor at whose suit the debtor was imprisoned, and that in the execution of the said trust, he is subject to the general principles of equity applicable to trusts of that nature. That the said deed, though an absolute conveyance in fee simple, is in the nature of a mortgage to Hutcheson, in trust to secure the payment of the judgment recovered by Shipperson against Peshine, and that the complainant is therefore entitled, as mortgagee, to have the premises sold under the direction of this court, the amount due upon the prior encumbrances ascertained and paid, and the balance appropriated in pursuance of the trusts under which the conveyance was made.

The bill prays for relief accordingly, and that a receiver may be appointed to collect the rents of the premises, and apply the same to the satisfaction of the encumbrances.

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To this bill, the defendants, Peshine and wife, and several of the creditors of Peshine, who are prior encumbrancers, demur.

Frelinghuysen, for the defendants, in support of the demurrer.

1. The deed to Hutcheson is void under our assignment law. It is an assignment giving preference to some creditors in exclusion of others. *Varnum v. Camp*, 1 *Green* 326.

2. A deed given by an insolvent under the laws of one state for land lying in another, is void. *Burrill on Assignments*, 335-6, chap. 30; *Osborn v. Adams*, 18 *Pick.* 245; *Lessee of McCullough's heirs v. Roderick*, 2 *Hammond (Ohio)* 380; *Rogers v. Allen*, 3 *Ibid.* 488. The reason is that laws of one state should not control property in another.

3. As against prior encumbrancers, Hutcheson is bound to redeem. He can not ask a forced sale. He stands in no better position than mortgagor.

4. If complainant stands in better position than mortgagor, it must be by virtue of the law of Virginia, which this court will not recognize. 7 *Johns. Ch. R.* 140.

C. Parker, for the complainants, contra.

I. Will the deed pass the lands?

Why should it not? It is similar to deed of insolvent under our law.

1. It is formal. 2. It had good consideration. 3. There was no duress; the imprisonment was lawful. *Bouvier's Law Dict.*, "Duress."

To be contrary to our act, the assignment must be general of all property to pay all creditors, but creating preferences.

The act expressly permits preference of *Judgment* creditors. Here a judgment creditor only is preferred.

We admit the trust, and seek the aid of the court in order to its discharge.

If valid without the law, is it weakened because the law authorizes it?

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The cases of *Frazier v. Fredericks*, 4 *Zab.* 162, and *Varnum v. Camp*, 1 *Green* 326, settle the law of this case.

II. Are the complainants entitled to the relief prayed for?

The bill charges that this is a mortgage in *trust* to pay debt. We are entitled not simply to the *redemption*, but also to foreclosure and to marshaling of assets.

Mr. Parker also cited *Holmes v. Remsen*, 4 *Johns. Ch. R.* 483; *S. C.* 20 *Johns. R.* 266; *Selkirk v. Davies & Salt*, 2 *Dow* 230; *Bank of Scotland v. Cuthbert*, 1 *Rose* 462; *Plestoro v. Abraham*, 1 *Paige* 237; *Byrne v. Walker*, 7 *Serg. & R.* 483; *Story's Conflict of Laws* (4th ed., 1852,) § 411-18, note to page 685.

Mr. Frelinghuysen, in reply.

The encumbrancers have a right to demur. They have a standing in this court to insist that the title of the complainant is invalid.

An examination of the deed shows that it is *not* an assignment of specific property to pay a specific debt. The case of *Frazier v. Fredericks*, therefore, does not apply.

THE CHANCELLOR. It is clear that a general assignment by a debtor of all his property, real and personal, under the insolvent laws of Virginia or of any other state, can pass no title to real estate in New Jersey. The point has been more than once expressly adjudicated. *Lessee of McCullough's heirs v. Roderick*, 2 *Hammond* 380; *Rogers v. Allen*, 3 *Ohio* 488; *Osborn v. Adams*, 18 *Pick.* 247.

The rule rests not only upon the acknowledged principle of law applicable to all assignments, voluntary as well as legal, that the title and disposition of real estate are exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which title to it can pass; but upon the further reason, that the laws of one state will not be permitted to control the trust, the action of the trustee, and the disposition of the trust property in another, the subject of the trust being real estate.

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This principle appears to be recognized by the statutes of Virginia under which the conveyance was made. They provide that the debtor shall, previous to his discharge from imprisonment, in addition to the general assignment for the benefit of the execution creditors, make a conveyance to the sheriff of all his real estate not within the state of Virginia, upon the same trusts as those created upon the general assignment.

It is under a deed thus executed, and which the bill alleges is made, acknowledged, and recorded, in conformity with the laws of this state, that the complainant asks relief. So far as the formalities of execution are concerned, it will be assumed for the purposes of the present inquiry, that the deed is a valid instrument. It is nevertheless apparent upon its face, that the deed in question is not a *voluntary* conveyance. It was executed by a debtor under arrest to the officer in whose custody he was detained, in order to obtain his discharge under the insolvent laws of Virginia. The execution of the deed was by those laws a prerequisite to his obtaining his discharge. It is merely ancillary to the general assignment, burdened with the same trusts and designed to carry the assignment into effect. Independent of those trusts and of the provisions of the statutes of insolvency, the deed is without consideration and void as against the grantor. It is not pretended that there is any other consideration for the conveyance. The sheriff to whom the conveyance was made, was not a creditor of the grantor, but a mere trustee.

Then will this court lend its aid to carry those trusts into effect? It is impossible to distinguish the case from that of an assignment under the insolvent laws of another state. The deed was executed for the purpose of carrying the trusts of the assignment into effect, and in compliance with the requirements of the statute. In *Osborn v. Adams*, 18 *Pick.* 248, the Supreme Court of Massachusetts say: "We can take no notice of a trust created by proceedings under the statute of the state of Connecticut; we can no more take notice of a

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trust created under a foreign government, than we can of a will not proved nor recorded in this commonwealth."

This court, therefore, cannot recognize the trusts thus created for the purpose of carrying them into effect.

But aside from this difficulty, admitting that this court might recognize the trusts thus created, it is obvious that the trusts created under this assignment, are in direct conflict with the policy and with the express provisions of our laws. Our statute requires that every conveyance or assignment made by a debtor of his real or personal estate, in trust for his creditors, shall be made for their equal benefit in proportion to their several demands. The deed in question is made in trust for the payment of the execution creditors only, and then in trust for the debtor himself. It not only gives a preference to the execution creditors in Virginia, but utterly excludes others from all participation in the trust funds. I surely cannot be required that this court should administer trust funds growing out of the sale of real estate situated in this state, in direct conflict with our laws, to the prejudice of creditors residing here.

It is urged that the objection to the validity of the assignment does not lie in the mouth of the assignor, nor of creditor having liens prior to the assignment, and can only proceed from some creditor who is prejudiced by the assignment. This is not so. The objection is not merely that the assignment is fraudulent as against subsequent creditors, but that it is illegal and inoperative as a transfer of real estate, and that the trusts under it will neither be recognized nor executed by the courts of this state.

In *Rogers v. Allen*, 3 *Hammond* 485, already referred to in taking the benefit of the insolvent laws of Pennsylvania Allen had made an assignment of all his real and personal estate, including a tract in the state of Ohio, for the benefit of his creditors. The trustees made sale of the lands, and the purchaser went into possession. Allen, the assignor brought an action of ejectment, and recovered. A bill in equity was thereupon filed by the trustees setting out th

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facts, alleging that the other property assigned was insufficient to pay the debts of Allen, and praying a decree to sell the land for the benefit of the creditors. The demurrer was sustained and the bill dismissed. The court say, as no title passed by the deed, we do not see any principle upon which any equity can be created to be enforced here.

This case is in no wise affected by the principle of the decision in *Frazier v. Fredericks*, 4 Zab. 162. That was a voluntary assignment of personal property, and governed by principles entirely distinct from those which control the present inquiry.

The bill must be dismissed.

NOTE. The reporter is indebted to Joseph P. Bradley, Esq., for a copy of the opinion in this case, delivered May Term, 1861, but as yet unpublished. Its importance, it is believed, will be found to justify its publication at this time.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY,

MAY TERM, 1863.

GILBERT SCHENCK and others *vs.* JOHN G. SCHENCK and LISCOMB R. TITUS, executors of Garret J. Schenck, deceased.

1. Where the executors of an executor have received and inventoried as part of the estate of their testator, a trust fund held by him at his death in the character of *executor*, and not as trustee, and have settled their final account jointly, they are jointly chargeable as *executors*, with the balance thus found to be in their hands.

2. The rule appears to be, that if a part of the assets has been clearly set apart, and appropriated by the executor to answer a particular trust, he will be considered to hold the fund as trustee for the trust, and no longer as mere executor. This principle is applied to protect the interests of *cestui que trusts*.

But how far it will avail to protect the executor or his representatives—*Query.*

3. But where a fund is not treated by the executor as a trust fund, nor invested according to the provisions of the will creating it, but is used by him as his own property, or invested in the name of the executors of his testator, the estate of such executor is liable therefor, and passes into the hands of his executors charged with the payment of the trust fund. As executors, they are bound to account.

4. Upon the death of one of several co-trustees, the *office* of trustee will devolve with the estate upon the survivor, and ultimately upon the heir

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or personal representatives of the last survivor. Trusts of real estate, upon the death of the trustee, devolve upon his heir-at-law; trusts of personality vest in his executor or administrator.

5. The probate of the will is conclusive evidence of the executor's acceptance of the trust. It is not discretionary with the executor, whether he will or will not act as trustee. By accepting the office of executor, he becomes *ex-officio* trustee in the stead of his testator, charged with all the duties and responsibilities of the office, and he will be decreed in equity to perform the trust.

6. An executor has an undoubted legal right to leave the active administration of the estate to his co-trustee, but neither by his tacit assent to the acts of his co-trustee, nor by the actual transfer of the legal title to the property, can he acquit himself of his responsibility.

7. If a trustee, by his own negligence, suffers his co-trustee to receive and waste the trust fund, when he has the means of preventing such receipt by the exercise of reasonable care and diligence, he will be held responsible for the loss.

P. L. Voorhees, for complainants.

The executors received this money either as executors of surviving executor of John Schenck, or as executors of surviving trustee, under will. Legacy is to executors in trust.

Real estate is by the will directed to be converted into personal. It is regarded in equity as personal. *Scudder's Ex'res v. Vanarsdale*, 2 *Beas.* 109; *Rinehart v. Harrison's Ex'res*, *Bald.* 177; *Hill on Trustees* 303.

Where there are several trustees appointed, on the death of one, the whole goes to the survivors; on the death of the last trustee, it goes to his personal representatives. *Willis on Trustees* 53-4.

If the defendants take as executors of executor, we are clearly entitled to an account. *Nix. Dig.* 276, § 4.

It is admitted that the fund is in the hands of one executor; when in the hands of one executor, entitled to an account against all. *Norton v. Turvill*, 2 *P. W.* 144; 2 *Williams on Ex'res* (ed. 1855) 1760, note r.

Justice will not be done by a simple decree for account. There must also be a decree to pay over the fund. *Adams' Eq.* (1854) 226.

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It is true the executors never qualified as trustees, being really such, equity will not allow trust to be lost on death of one of them. *Hill on Trustees* 171.

By the settlement of their joint account the executors admit a fund of \$3000 in their hands, for which they are jointly accountable. The defence of Titus is, that he took Schenck worth \$14,000, but before the suit commenced had full knowledge of his insolvency. These circumstances make him responsible for trust fund.

As to when trustees are responsible. 3 *Lead. Case in Eq.* 468.

With the knowledge that John G. Schenck was insolvent Titus failed to invest the trust money properly, but suffered him to take it. It was his duty to have protected that fund. 2 *Story's Eq. Jur.*, § 1283; *Adams' Eq.* 59.

By omitting to have the fund secured, he made himself liable. 3 *Lead. Cases in Eq.* 465-66-68-70; *Hill on Trusts* 309; 2 *Williams on Ex'r's* 1548.

Will gives express directions to invest trust fund in estate. The direction is binding. 3 *Lead. Cases in Eq.* 471. If trustees neglect to comply, they all become responsible.

The allegations of the answer, no answer to the charge in the bill; mere confession and avoidance; they must be proved. 3 *Lead. Cases in Eq.* 470-1; 2 *Ibid.* 125.

We are entitled to costs against the trustees. *Warbas v. Armstrong*, 2 *Stockl.* 263.

Mt. Voorhees further cited *Wills v. Cooper*, 1 *Dutcher* 1 *Fennimore v. Fennimore*, 2 *Green's Ch. R.* 296; *Laro Douglass*, 2 *Beas.* 308; *Bellerjeau v. Ex'r's of Kotts*, 1 *S. & S.* 309; *Hill on Trustees* 288, note.

Beasley, for L. R. Titus.

The whole scope of the bill is to charge Titus jointly with the other defendant as recipient of the fund, and to item jointly responsible for that cause.

The whole case rests on the charge of negligence. Who is to be negligent to charge Titus? It is said he knew of

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trust, and of Schenck's insolvency. The affidavit don't show it.

The co-trustee not responsible unless from acquiescing, standing by and permitting fraud.

The charge is clearly against the defendants as trustees, not as executors. The question under the bill is not how far the executor has become liable by settling joint account, but how far the trustee has become liable by permitting his co-trustee to take the fund.

Mere passiveness will not make him liable. But if trustee co-operates to put trust fund into the hands of his co-trustee, then he is responsible; not for mere negligence.

The fact that the defendants are sued as trustees is important. It shuts out the question of estoppel by the settlement of the joint account as executors.

The complainant will not be permitted to set up decree in Orphans Court as an estoppel, inasmuch as he opened the inquiry in the bill as to who did receive the trust fund. The complainant makes the inquiry, and Titus answers under oath that he did not receive it.

Estoppel is *stricti juris*. It may be waived. Complainant's opening the inquiry is in fact a waiver.

Estoppel must be pleaded, if party has an opportunity. It then becomes matter *in pais*.

The case has been argued upon the assumption that on the death of trustee, the *office* devolves on his representatives. *Hill on Trustees* 303. The doctrine relates to *property*; not to the *office*. *Lewin on Trustees* 279.

Executor of an executor is bound to take care of the property of the estate, but not bound to execute the office of trustee held by the executor. This idea is countenanced by the statute. *Nix. Dig.* 578, § 13.

The fund in question, over and above the Runkle Rea note, being mingled with the general estate, was properly assets. The *cestui que trusts* could have no preference over other creditors, if the first executor had died insolvent. *Moses v. Murgatroyd*, 1 Johns. Ch. R. 128; *Kip v. Bank of New York*, 10 Johns. R. 63.

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Mr. Beasley further cited 2 Williams on Ex'res 1664; Adair v. Shaw, 1 Sch. & Lef. 243; Cook v. Cook, Halst. Dig. 465; Langford v. Gascoyne, 11 Vesey 334; Bacon v. Bacon, 5 Ibid. 331; Sadler v. Hobbs, 2 Bro. Ch. R. 115; 2 Story's Eq. Jur., § 1281, note 2; Duchess of Kingston's case, 2 Smith's Lead. Cases 444, note; Kilheffer v. Herr, 17 Serg. & R. 319; Howard v. Mitchell, 14 Mass. 242; Livingston v. Combs, Coxe 42; Swinburne on Wills, part 6, § 21; Nix Dig. 581, § 27; Goble v. Andruss, 1 Green's Ch. R. 66; Black v. Whitall, 1 Stockt. 584; Fennimore v. Fennimore, 2 Green's Ch. R. 296; Nix. Dig. 578, § 13.

THE CHANCELLOR. John Schenck, late of the county of Hunterdon, in and by his last will and testament, bearing date on the twelfth of August, 1823, among other things gave and bequeathed as follows: "I do give and bequeath one other ninth part of the said residue of my estate to my executors hereinafter named, upon this special trust and confidence, and to the intent and purpose that my said executors shall place the same out at interest on landed security, or such security as the Orphans Court may approve, and shall pay the interest thereof annually, as they shall receive the same, into the proper hands of my said son Gilbert, during his natural life; and that upon his death the interest, if any remaining, and the principal sum shall be equally divided between, and paid to his children that may be then living, and in case any of them shall have died leaving issue, such issue to take the parent's share, to be paid to the said children, if of age, or to the guardians of such of them as may be minors, as soon as conveniently may be after my son Gilbert's death, deducting such reasonable expenses and allowance for the care and management of the said trust as the Orphans Court shall allow."

On the fifth of April, 1854, there came to the hands of Garret J. Schenck, the sole surviving executor, on account of the principal of the residuary legacy to the complainants, \$2160.34. Of this sum \$1101.38 was paid in cash. The

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balance consisted of a note of Runkle Rea to the executors for \$1058.96. The fund remained in his hands unchanged until his death.

By his will he appointed his son, John G. Schenck, and his son-in-law, Liscomb R. Titus, the defendants in this cause, his executors. On the twenty-fourth of June, 1858, they filed an inventory of the estate of their testator, amounting to \$14,873. At September Term, 1859, they settled their joint final account, by which, after charging themselves with the amount of the inventory, they deduct therefrom the sum of \$1058.96 (the amount of the note of Runkle Rea), as trust money of Gilbert Schenck, leaving a balance of \$13,814.32, with which they charge themselves, and after deducting all disbursements, including commissions and \$9000 of special pecuniary legacies, there remained in the hands of the executors a net residue of the estate of \$3745.45. The complainants seek to charge the defendants, jointly, with the amount of the trust fund in the hands of their testator at the time of his death.

A decree *pro confesso* has been taken against John G. Schenck, one of the defendants, for want of an answer. Liscomb R. Titus, the other defendant, has answered, alleging by way of defence, that as executor, he received no part of the funds belonging to the estate of his testator, but that the whole assets of the estate were received and administered by his co-executor, John G. Schenck, who alone is responsible for the trust fund in the hands of his testator.

The sole question to be decided is, whether, upon the ascertained facts of the case, Titus is liable for the trust money due to the complainants, or whether Schenck, the co-executor, is alone liable. If the fund was in the hands of the defendants' testator, Garret J. Schenck, at his death as executor of his father, and not as trustee, it seems clear that the defendants are jointly liable as executors of the executor. He received the fund from the estate of his co-executor, and gave his receipt for it as executor, and not as trustee. The fund continued in his hands unchanged

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until his death. He did not invest it in real estate, or under the direction of the Orphans Court, as required by the will. The Runkle Rea note was given to the executors in that character, and was held by Garret J. Schenck, the surviving executor, unchanged until his death. The cash received by him as a part of the fund was mingled with his own estate, and so continued when his estate passed into the hands of his executors. He did nothing whatever to distinguish it from the bulk of the testator's estate. The estate remained after his death unchanged by the defendants. The Runkle Rea note still continues, if the answer is to be relied upon, in the name of the executors of John Schenck, deceased. The balance of the fund came to the hands of the defendants, as part of the property of their testator. It was included in their inventory of his estate. It continued in their hands until the final settlement, when it was deducted from the amount with which the executors had charged themselves. This is the account given of the matter by the answer, and I think it is the true statement of the facts. The complainants, when filing their bill, appear to have supposed that the whole amount of the trust fund, including the Runkle Rea note, had been included in the inventory. And this conclusion was very natural, from the fact that the precise amount of that note was, upon the final settlement, deducted from the sum with which the executors had charged themselves. It seems probable indeed, that the surrogate, or whoever stated the account, supposed that that note constituted the entire trust estate, for it is deducted as the trust money of Gilbert Schenck, retained by John G. Schenck, one of the accountants. But that note is not included in the inventory, and it seemed to be conceded upon the argument, that it is still in existence and in the hands of one of the defendants. The deduction of the amount of the note, therefore, from the amount of the inventory, must either have been from a mistaken supposition that the note was included in the inventory, or that it covered the precise balance of cash in the hands of the executors. But it did not cover it.

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Independent of the Rea note, and of the interest, there was, at the date of the settlement, a cash balance of \$1101.38 of the principal of the trust fund in the hands of the executors. Regarding the trust fund in the hands of Garret J. Schenck at his death, as held by him in his character of executor, there is nothing in the case that can relieve the defendants from joint liability as his executors. They received and inventoried his estate, and settled their final account jointly as executors. Under such settlement and decree, the executors are jointly chargeable with the balance thus ascertained to be in their hands. *Bellerjeau v. Ex'rs of Kotts*, 1 South. 359; *Fennimore v. Fennimore*, 2 Green's Ch. R. 296; *Laroe v. Douglass*, 2 Beas. 308.

But it is urged that neither the facts of the case, nor the frame of the bill, will justify a decree against the defendants as executors of an executor. That the funds were in the hands of Garret J. Schenck, not as executor of John Schenck, but as trustee of the complainants, and that the defendants held the fund, not as executors, but as trustees.

It appears by the will of John Schenck, that the fund in question, being one ninth of the residue of his estate, was bequeathed to his executors as trustees. The bill alleges that, after they had settled their final account as executors, the fund remained in the hands of Peter Voorhees, one of the executors, in trust for the complainants, having been separated from the rest of the estate for that purpose. That after the death of Peter Voorhees, the fund was paid by his representatives to Garret J. Schenck, then being the sole surviving executor of John Schenck, and was received by him as the distributive share of Gilbert Schenck, in the estate of his father, left as a trust fund in the hands of the executors. The rule appears to be, that if a part of the assets has been clearly set apart and appropriated by the executor to answer a particular trust, he will be considered to hold the fund as trustee for those trusts, and no longer as mere executor. *Hill on Trustees* (ed. 1857) 215, 237, 297, 364.

This principle is applied to protect the interest of the *cestui*

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que trusts, but how far it will avail to protect the executor or his representatives from responsibility, is another and a different question.

A decisive answer to this view of the case would seem to be that Garret J. Schenck, the defendant's testator, did not treat the fund in his hands as trustee. It was not invested pursuant to the will of John Schenck. It was either used by him as his own property, or invested in the name of the executors of John Schenck. His estate was liable for the money. It passed into the hands of his executors, charged with the payment of the trust fund. As executors, therefore, they are bound to account.

But admitting that Garret J. Schenck at his death held the fund in the character of a trustee, still the question remains, are not his executors jointly liable for the trust fund?

Upon the death of one of several co-trustees, the *office* of trustee will devolve, with the estate, upon the survivor, and ultimately upon the heir or personal representatives of the last survivor. Trusts of real estate, upon the death of the trustee, devolve upon his heir-at-law. Trusts of personality vest in his executor or administrator. *Hill on Trustees* 175; *Willis on Trustees* 53; *Lewin on Trustees* 205.

Not only the estate but the office of trustee is devolved upon the executor. The probate of the will is conclusive evidence of his acceptance of the trust. It is not discretionary with the executor whether he will or will not act as trustee. By accepting the office of executor he becomes *ex officio* trustee in the stead of his testator, charged with all the duties and responsibilities of the office, and he will be decreed in equity to perform the trust. *Harvey v. Harvey, Reports Temp. Finch* 363.

By accepting the office of executors, these defendants became co-trustees of the fund in question, and jointly liable for the amount which came to their hands. There came to the hands of the executors of the estate of their testator over \$12,000, charged with the payment of this trust fund. They paid \$9000 of legacies, and there remained a net bal-

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ance in their hands on the settlement of the estate, of \$3745.-45, which went to the residuary legatee. The first duty of the executors was to have invested the trust fund, in pursuance of the instructions of the will, in real estate, or under the direction of the Orphans Court. The one half of it was confounded with the assets of the testator, and the balance was suffered to remain at interest upon a promissory note without security, given to the executors of the original testator, which may or may not prove available. As an excuse for this neglect, one of the trustees, the only one who is responsible or makes defence, says he received none of the trust funds, and he deemed it unnecessary to participate actively in the administration of the estate, as his co-trustee was the sole residuary legatee and was worth at least \$14,000, after the payment of his debts. But the fact that he confided in the pecuniary ability or personal integrity of his co-trustee, was no justification of his neglect of an imperative duty. The answer further alleges that the defendant did not contribute, in any way, to put the trust money, or any part of it, in the possession or under the control of John G. Schenck. But the evidence shows not only that the entire estate of the testator came to the hands of these executors jointly, as in law it did, but that they exhibited a joint inventory under the oath of both executors, showing that over \$14,800 of estate had come to their possession, including over one half of the trust fund itself, and charged with the payment of the whole of it. Mr. Titus not only exhibited this joint inventory under oath, but he consented to the payment, out of the estate, of \$9000 of legacies. He received from his co-executor \$2000, a legacy to his own wife. He settled a joint account, claiming credit for the payment of all these legacies, and claiming commissions on the whole amount of the inventory; not deducting even the specific portion of the trust estate included within it. As executor, he had the legal title to this property and the right to control it. It does not appear that his co-executor ever denied his right, or objected to his control. He took such active

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part in the management of the estate as to guard his own rights, and secure his own legacy and his own commissions. Had he taken the same care of the trust fund committed to his keeping, this controversy would never have arisen. He had an undoubted legal right, as executor, to leave the active administration of the estate to his co-trustee. But neither by his tacit assent to the acts of his co-trustee, nor by the actual transfer of the legal title to the property, can he acquit himself of his responsibility.

If a trustee, by his own negligence, suffers his co-trustee to receive and waste the trust fund, when he had the means of preventing such receipt by the exercise of reasonable care and diligence, he will be held responsible for the loss. *2 Story's Eq.*, § 1273; *Adams' Eq.* 58, 59; *Laroe v. Douglass*, 2 *Bear.* 308.

It is sometimes said, that the application of this principle of law operates harshly against a trustee acting in good faith. But in the present case, I think there is no ground even for that suggestion. Mr. Titus, when he accepted the executorship of the estate of his father-in-law, knew of the existence of this trust. He was apprized of it by the testator before his death. Soon after the death of the testator, his son, the co-trustee and brother-in-law of Mr. Titus, exchanged with him the farm devised to him by his father's will, for an extensive hotel in the city of Trenton. The son incurred heavy expenditures in the repairs and improvements of the property thus acquired. He embarked, moreover, largely in a business which Mr. Titus himself characterizes as hazardous. Within three years from his father's death, these steps led to the utter insolvency of the executor, or to the fraudulent concealment of his property, and his absconding from his creditors. Most of these steps were with the knowledge of Mr. Titus. He acted as his agent, book-keeper and counsellor in many of his affairs. He was not only a near connection, but on terms of personal intimacy with him. It appears from his evidence, that he apprehended his insolvency before it occurred, and took measures in the hope of securing

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himself, but he made no effort to secure the trust fund which had been committed to his keeping.

The case appears to me to be clearly one in which the principle should be inflexibly maintained, and where no injustice can result from its application.

The defendants are jointly liable for the trust fund. There must be an account, and the fund be brought into court.

The complainants are entitled to a decree accordingly.

JOHN S. ROSE *vs.* CHARLES B. KIMBALL.

1. A deed of assignment endorsed upon a mortgage, though duly executed and acknowledged, passes no interest to the assignee, where the contract under which the assignment was executed, was never consummated, and the mortgage never delivered to the assignee.

2. A party taking by assignment from the first assignee, with constructive notice of prior equities, will stand in no better position than his assignor.

P. L. Voorhees, for complainant.

Richey, for defendant.

THE CHANCELLOR. The bill is filed to foreclose a mortgage for \$4200, given by Henry S. Harper and wife to Spencer Shoemaker, and by Shoemaker assigned to the complainant. The mortgage is dated and acknowledged on the fifteenth of February, 1856, and recorded on the twenty-sixth of the same month. The assignment is dated and acknowledged on the fifth of August, 1857, and is recorded on the nineteenth of the same month. There is no question as to the formal execution and delivery of either instrument. The case, as made by the bill, is very clearly established by the evidence.

The defence is that Shoemaker, the mortgagee, previous

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to the assignment by him to the complainant, had assigned the mortgage to one Enos P. Gibson, by whom it was subsequently assigned to Charles B. Kimball, one of the defendants. The controversy turns entirely upon the validity of this assignment to Gibson. There appears to have been endorsed upon the mortgage, a formal deed of assignment from Shoemaker and wife to Gibson, bearing date on the first day of March, 1856, purporting to have been executed in the presence of two witnesses, and to have been acknowledged on the fourteenth of the same month before a commissioner resident in the city of Philadelphia. This assignment and the acknowledgment are cancelled. The seals are torn off, the names are erased, and across the instrument are written the words, "this assignment not consummated."

Shoemaker, the mortgagee, testifies that at the date of the assignment to Rose, the complainant, he was the owner of the bond and mortgage, that they were in his possession, and that he had never before parted with their ownership. He admits the execution of the assignment upon the mortgage, but says that no consideration for the assignment was received, and that the mortgage was never delivered to Gibson; that Gibson was his partner in the business of conveyancing, and that the sale was made to a third party, who requested the assignment to be executed to Gibson. This was done accordingly, but the consideration agreed upon was not paid, and the contract never consummated.

It appears that on the eighteenth day of June, 1857, a bill was filed in this court in the name of Gibson, the assignee, which, so far as appears of record, is still pending. Shoemaker testifies that he placed the mortgage in the hands of the solicitor for collection, employed him as counsel, and paid him a retaining fee; that he afterwards procured the mortgage from the solicitor, and made the assignment to the complainant.

In confirmation of this statement, the solicitor testifies that he was employed by Shoemaker to foreclose the mortgage, and received a fee from him. That he filed the bill in

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the name of Gibson, because there was an assignment upon the back of it to him, then uncancelled. That the suit was subsequently discontinued, or agreed to be discontinued, at Shoemaker's request, to whom the solicitor delivered the mortgage, and received from him payment of the taxed bill of costs. The bill of costs as taxed and paid by Shoemaker, includes the costs of discontinuing the suit. The solicitor further testifies that he knew no other person in the business but Shoemaker. That Gibson left the bond and mortgage at his office, saying that Shoemaker would call and instruct him what to do with them. That Shoemaker gave him the instructions to foreclose the mortgage, and that he did not know Gibson in the matter. That Shoemaker expressed surprise that the foreclosure was commenced in Gibson's name, and that the assignment upon the mortgage was cancelled by Shoemaker, on receiving it from the solicitor, and in his presence.

The bill of costs, referred to by the solicitor, was taxed and filed on the eighteenth of July, 1857. The assignment by Shoemaker to Rose, the complainant, was executed and acknowledged on the fifth of August following, and recorded on the nineteenth of the same month.

The instrument which is claimed to be an assignment from Gibson to Kimball, the defendant, bears date on the fifteenth of December, 1857, long after the assignment to the complainant had been recorded. Admitting therefore that he paid value for it, he took it with constructive notice of the assignment to the complainant. He took the assignment under circumstances which, if not decisive evidence of a fraudulent purpose, at least afford the strongest evidence that the transaction was not in good faith. The bond and mortgage were not in the hands, nor under the control of the assignor. The instrument of assignment is in the form of a notice to the solicitor, that Gibson thereby transferred all his interest in the mortgage for value received, and authorizes the transfer of the mortgage to Kimball, and the suit to be discontinued. When this instrument was in fact executed, does not appear

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except from Gibson's own evidence. The subscribing witness is not produced. It was never acknowledged, but purports to have been recorded in the clerk's office of Camden county on the fourteenth of December, 1860, three years after its date. Kimball indeed swears that at the time of this assignment, the mortgage was in the hands of the solicitor, who was foreclosing it for Gibson. Now, not only the evidence of the solicitor, but the endorsements upon the mortgage itself, show that months previously, the mortgage had been delivered by the solicitor to Shoemaker, and had been by him assigned and transferred to Rose, the complainant. Kimball does not pretend that he ever saw the mortgage in the hands of the solicitor, and there is no apparent reason why the solicitor should ever have made the statements which Kimball alleges he did make.

The evidence of Kimball himself furnishes the strongest evidence, not only that the assignment from Gibson to him was procured in bad faith, but that the consideration paid for it, if any thing, was merely nominal. The entire mortgaged premises, consisting of over five hundred acres of land, were conveyed to Kimball for the sum of one dollar, and were expressly declared on the face of the deed to be subject to the complainant's mortgage. Haines bought the equity of redemption for one dollar. He now attempts to relieve the land from the burden of the mortgage for a nominal consideration. There is not the least evidence in the cause, independent of the testimony of Gibson, whose evidence is totally unreliable, and of Kimball himself, tending to show that he paid one dollar consideration for the mortgage. It is impossible to read Kimball's own evidence without a strong conviction that the consideration he paid was of no value. He testifies, indeed, that knowing all about the property, he gave \$3000 for the assignment, and yet proves by a witness, who is not contradicted, that the property is not worth half the money.

The evidence renders it very probable that the mortgage was originally made and assigned for a dishonest

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purpose, but I see no reason for supposing that Kimball ever had the least title to it, in law or in equity, nor any ground upon which the title of the complainant can be impeached, or his right to relief questioned.

ARCHIBALD K. KEARNEY vs. ALEXANDER S. MACOMB and others.

1. Where the duty of a trustee is a matter of doubt, it is his undoubted right to ask and receive the aid and direction of a court of equity in the execution of his trust.

2. The familiar principle of the common law, that in the creation of an estate by *deed* the word "heirs" is necessary to pass the fee, has not been altered in this state by statute, nor has it been modified or relaxed by judicial construction. No synonym can supply the omission of the word "heirs," nor can the legal construction of the grant be affected by the intention of the parties.

3. An instrument conveying lands absolutely, not as security for money, nor to be held in trust for its repayment, but *in lieu of it*, is a deed. No subsequent event can convert it into mortgage.

4. The heir-at-law of the testator, claiming a legacy under the will, and also claiming real estate as heir-at-law against the will, the will being inoperative as to real estate by reason of a defective execution, the heir will not be put to his election, but will take both the legacy and the land. In such case the heir will not be required to give up the legacy, unless the legacy was bequeathed upon an express condition to give up the real estate.

5. A husband and wife by deed of trust, conveyed the legal title to certain real estate to the trustee *for life*, and by the same deed in terms, constituted the trustee attorney irrevocable, in the name of the grantors, or either of them, in conjunction with the grantors, to convey the land.

Held, that as respects the wife, the power *as such* was a nullity. She could not convey by letter of attorney.

Also, that it can only serve as evidence of an *intention* on the part of the grantors, to confer upon the trustee a power of sale.

Further, the trustee has no power of sale under the deed.

By an antenuptial settlement, bearing date on the seventh of April, 1840, executed by and between Susan Kearney, of

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the first part; Alexander S. Macomb, her intended husband of the second part; and Philip Kearney and Archibald K. Kearney, of the third part; the said Susan Kearney conveyed certain personal estate, and her interest in the proceeds of certain real estate, unto the said Philip Kearney and Archibald K. Kearney, their executors, administrators, and assigns upon the following trusts, *viz.* In trust (1) for the said Susan Kearney until her marriage. (2.) From and after the solemnization of her marriage, during the joint lives of the said Susan and Alexander, to pay the income of the trust fund to the said Susan or her appointee. (3.) Upon his death, if she survived her husband, to pay and transfer the said property to the said Susan. (4.) "And if it shall happen that the said Susan die before the said Alexander S. Macomb, her intended husband, then from and immediately after her decease to hold the said property so vested as aforesaid in the said trustees, in trust to pay, assign, transfer, and set over on equal half part thereof to the said Alexander S. Macomb her intended husband, for his absolute use, and to pay assign, transfer, and set over the other equal half part thereof to her father, the said Philip Kearney, his executors, administrators, or assigns, for his and their absolute use."

Philip Kearney, one of the trustees, died on the tenth of April, 1849, leaving the complainant the sole surviving trustee under the settlement.

He left Susan Macomb and Philip Kearney, his only children and heirs-at-law, surviving him. He left a will bearing date on the third of September, 1847, executed in the presence of two witnesses only, and therefore invalid to pass the title to real estate under the law of this state as then was. The will was admitted to probate in the city of New York, the place of the testator's domicil, on the eleventh of May, 1849. By his will he devised to his son Philip certain real and personal estate in the states of Illinois and Wisconsin, adding, by way of explanation to the devise, this clause: "The above is given to my son as an equivalent to my homestead at Newark, which I had desired to divid

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between him and his sister, which he did not wish, but preferred this arrangement." In the closing clause of the will the testator adds: "My affection for my surviving children being equal, my desire has been to divide my estate equally between them."

The said Philip Kearney, in and by his said will, also devised to his executors the Kearney homestead in Newark, in this state, in trust for his daughter Susan, during her life; at her decease, "the use and occupation of the premises to be for the testator's brother Archibald, so long as he lives; at his decease for the benefit of Susan's children, and should her children die without leaving issue, then to the testator's nearest heir."

The will devised a large amount of real estate in New York and elsewhere, to each of the testator's children, and is operative as to all the property devised, except the real estate in New Jersey, which, upon the testator's death, descended to and vested in his two children as tenants in common in fee. Being so seized, Philip Kearney, the son, by deed bearing date on the sixteenth of July, 1850, conveyed and released the undivided half of the homestead property to his sister, Susan Macomb, in fee simple.

Philip Kearney the elder, one of the trustees named in the deed of settlement, appropriated to his own use a portion of the trust fund, without the knowledge or consent of his co-trustee, whereby his estate became largely indebted to the trust. After his death, the said Alexander S. Macomb and Susan his wife, having received from the estate of the said Philip Kearney the amount so appropriated, and being desirous of investing the surviving trustee with property sufficient to make the original trust fund full, and having issue of their marriage two daughters, by deed bearing date on the first day of November, 1850, after the said Susan became seized in severalty of the Kearney homestead, conveyed to Archibald K. Kearney, the surviving trustee, "his legal representatives and assigns forever," nine lots of land in the city of New York, together with the homestead at

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Newark, "to have and to hold the same and the proceeds thereof to the said Archibald K. Kearney, his legal representatives and assigns forever, upon the trusts and conditions mentioned and set forth in the said antenuptial contract, in lieu of the sum of \$43,633 of the trust funds so appropriated by the said Philip Kearney, as such trustee aforesaid."

The grantors in and by the said deed also constituted the grantee and his representatives their attorney and attorneys irrevocable, with power in the name of the grantors to execute deeds for the said lots, with the usual covenants and warranty to carry into full effect and execution every contract which he or they might enter into for the sale of the said lots, or any of them.

The lots in New York thus conveyed, have been sold by the trustee for about \$65,000, so that there remains in the hands of the complainant, as surviving trustee, funds to a much larger amount than were originally conveyed to him and Philip Kearney, in trust, under the antenuptial settlement, and more than the sum intended to be replaced in order to make the original trust fund full.

On the twenty-ninth of April, 1852, Susan Kearney Macomb died intestate, leaving her surviving husband, the said Alexander S. Macomb, and two daughters, both of whom, at the time of filing the bill, were infants.

The Kearney homestead at Newark has greatly increased in value; large assessments are about to be made upon it for paving, and other improvements. The complainant has filed this bill to obtain the decision of questions which have arisen touching his interest and powers as trustee of the said property, and which the bill alleges it is necessary should be settled, to guide him in the execution of the trusts.

Parker and Keasbey, for complainant.

Bradley, for defendants.



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THE CHANCELLOR. Where the duty of a trustee is a matter of doubt, it is his undoubted right to ask and receive the aid and direction of a court of equity in the execution of his trust. The questions submitted in this case for the determination of the court, affect not only the duty of the trustee within the acknowledged limits of the trust, and in regard to the trust estate, but they involve the title of the trustee to the property in question. As the decision therefore seems of necessity to affect the rights of others who are not before the court, I have had some doubt as to the propriety of deciding those questions. But inasmuch as the decision is designed solely for the guidance and protection of the trustee, and as it will conclude the rights of those only who are parties to the proceeding, the points submitted for the opinion of the court will be determined.

1. The deed from Alexander S. Macomb and Susan Kearney his wife to the complainant, as surviving trustee under the marriage settlement of the Kearney homestead, passed an estate for the life of the grantee only, and not the fee simple. The grant is to the said Archibald K. Kearney, "his legal representatives, and assigns for ever." The habendum clause is, "to have and to hold * * to the said Archibald K. Kearney, his legal representatives and assigns for ever." There is no more elementary or familiar principle of the common law, than that in the creation of an estate by deed, the word "heirs" is necessary to make a fee. A grant to a man for ever, or to him and his assigns for ever, vests in him but an estate for life. *Littleton*, § 1; 2 *Bla. Com.* 107-8; 2 *Crabb on Real Prop.*, § 955; *Sheppard's Touch.* 86, 101-2; 2 *Preston on Est.* 11, 12; 4 *Kent's Com.* 5, 6; 1 *Washburn on Real Prop.* 28; 2 *Ibid.* 621.

The cases show clearly that no synonym can supply the omission of the word "heirs," and that the legal construction of the grant cannot be affected by the intention of the parties.

The common law rule has not been altered in this state by statute. Nor has it been modified or relaxed by judicial

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construction. In the recent case of *Traphagen & Adams v. Ross*, decided by the Court of Appeals at November Term 1860, the common law rule of construction was maintained in the learned and elaborate opinion of the Chief Justice, and adopted by the court.

2. The deed to the complainant recites the antenuptial settlement, the death of one of the trustees, the appropriation by him of \$43,633 of the trust fund to his use, and the desire on the part of the grantors of investing the surviving trustee with property equal in value to the said sum of \$43,633, in order to make the original trust fund full; and conveys the property to be held "upon the trusts and conditions mentioned and set forth in the antenuptial contract in lieu of the said sum of \$43,633 of the trust fund so appropriated by the said Philip Kearney, deceased, as such trustee." The terms of the deed admit of no question as to the purposes for which the estate is conveyed. It is to be held upon the trusts and conditions set forth in the antenuptial contract.

3. The terms of the deed to the complainant are absolute. No proviso or condition is annexed to the grant. None can be implied from the recitals in the conveyance. It is true the declared desire of the grantors was to invest the surviving trustee with property equal in value to \$43,633, in order to make the original trust fund full. But the deed is an absolute grant of the lands conveyed "in lieu of the said sum of \$43,633." Not as security for the said money, nor to be held in trust for its repayment, but *in lieu of it*. There is no intimation of an intention that in any event, any part of the land conveyed should revert to the grantors. If in its inception it was a deed, no subsequent event could convert it into a mortgage. A mere advance in the value of the land conveyed, beyond the amount of the debt for which it was transferred as a substitute, could not produce that result. What the value of the land conveyed was at the date of the conveyance, does not appear. At that time it might have been of equal value only with the amount in lieu of which it

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was conveyed. And even if it was then of greater amount, there are obvious reasons why the grantors should have desired, or at least consented, that the diminution of the trust fund should have been more than replaced. Under the circumstances, the conveyance and the trusts may have been alike injudicious and inexpedient. But the fee was in the grantors. They had a perfect right to dispose of it as they saw fit. *Stat pro ratione voluntas.*

I think there is nothing in the recitals of the conveyance, or in the terms of the grant, to justify the court in treating the conveyance as a mere mortgage, or in ordering the reconveyance of the homestead, upon the ground that the purpose of the conveyance has been answered by the lands already sold.

4. But it is urged that although the will is invalid and inoperative to pass land in this state, yet if the son and daughter of the testator, who are devisees under the will, would avail themselves of other parts of it, they must consent to carry out the devise in regard to this land also. They are put to their election to stand by the will *in omnibus*, or not to claim under it at all. And inasmuch as the land is, by the will of Philip Kearney, devised to his executors in trust for certain purposes in the said will specified, and the heirs-at-law have certain real estate elsewhere devised to them in said will, which they have elected to take, they are bound to permit the title of the Newark property to pass to the trustees for the purposes specified in the will.

The doctrine of election is founded upon the principle that a person shall not be permitted to claim under any instrument, whether it be a deed or will, without giving full effect to it in every respect, so far as such person is concerned. And the ground upon which courts of equity interfere is, that the purposes of substantial justice may be obtained by carrying into full effect the whole intentions of the testator. 1 *Jarman on Wills* 385; 2 *Roper on Leg.* 1567; 2 *Story's Eq. Jur.*, § 1075-7.

Where the devise is valid, but inoperative because the title

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is not in the devisor but in the devisee, the application of the principle is clear.

But where the devise is invalid because not a good execution of the power to devise, or because of the infancy of the devisor, or because the will is not duly executed to pass real estate, the heir-at-law may take both the land devised and also the legacy. In *Hearle v. Greenbank*, 1 *Vesey, sen.*, 298, Lord Hardwicke said: "The infant is not obliged to make her election, for here the will is void; and when the obligation arises from the insufficiency of the execution or invalidity of the will, there is no case where the legatee is bound to make an election, for there is no will of the land. A man devises a legacy out of land to his heir-at-law and the land to another; the will is not executed according to the statute of frauds for the real estate; the court will not oblige the heir-at-law, upon accepting the legacy, to give up the land." In such case the heir will not be required to give up the legacy, unless the legacy was bequeathed upon an express condition to give up the real estate. *Boughton v. Boughton*, 2 *Vesey, sen.*, 12.

In *Carey v. Askew*, cited 8 *Vesey* 492, 497, Lord Kenyon said: "The distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an express condition to give up a real estate, by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election; as he could not take the legacy without complying with that express condition. But Lord Kenyon also took it to be settled as Lord Hardwicke had adjudged, that if there was nothing in the will but a mere devise of real estate, the will was not capable of being read as to that part; and unless, according to an express condition, the legacy was given so that the testator said expressly the legatee should not take unless that condition was complied with, it was not a case of election." The principle was affirmed by Lord Eldon as a long settled doctrine, in *Sheddon v. Goodrich*, 8 *Vesey* 482.

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The doctrine of these cases is, that the heir-at-law of the testator claiming a legacy under the will, and also claiming real estate as heir-at-law against the will, the will being inoperative as to real estate by reason of a defective execution, the heir will not be put to his election, but will take both the legacy and the land. In such cases "the heir is allowed to disappoint the testator's attempted disposition by claiming the estate in virtue of his title by descent, and at the same time take his legacy on the ground that the want of a due execution precludes all judicial recognition of the fact of the testator having intended to devise freehold estates; and therefore the will cannot be read as a disposition of such estates for the purpose even of raising a case of election as against the heir." 1 *Jarman on Wills*, (ed. 1849) 389; 1 *Dev. & Bat. Eq.* 634; 4 *Dess. Ch. R.* 274; 1 *Lead. Cases in Eq.* (3d ed.) 404.

Upon the well settled doctrine of the court of equity, this is not a case in which the heir could be put to his election if all the property affected by the will were within the jurisdiction and under the control of the court. There is no condition annexed to the devise to the heir-at-law, either express, or by necessary implication. It is no will of land in this state. The will is not executed and attested according to our law, and can create no case for election as to lands here, from implication. *Jones v. Jones*, 8 *Gill* 197.

If the doctrine of election is at all applicable under the terms of the will, it would seem proper to be applied in the tribunals of those states where the heir shall claim by virtue of the devise. If he claim under the will he may be put to his election, but how shall he be put to his election when he claims as heir-at-law, there being no valid will in existence by which the title to the property can be affected.

Philip Kearney, the elder, died intestate as to his real estate in New Jersey. Upon his death it descended to his children, Philip Kearney and Susan Macomb, as tenants in common in fee. Upon the conveyance and release by Philip Kearney of his interest to his sister, she became seized of

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the whole estate in severalty. The deed from Alexander Macomb and wife to the complainant conveyed a life estate only. That estate he holds, according to the express terms of the grant, upon the trusts and conditions of the antenuptial contract, and not upon the trusts contained in the will of Philip Kearney, the elder.

The deed is very peculiar in its structure. It conveys the legal title to the trustee, and then in terms constitutes him the attorney irrevocable of the grantors, in the name of the grantors or either of them, in conjunction with the grantors, to convey the land. As respects the wife, the power as such was a nullity. She could not convey by letter of attorney. *Adm'rs of Earle v. Earle, Spencer* 360.

This clause of the deed can only serve as evidence of an intention on the part of the grantors to confer upon the trustee a power of sale. But then the conveyance should be executed in substantial conformity with the power. I incline to the opinion that the trustee has no power of sale under the trust deed. If a sale becomes necessary or expedient for the interests of the *cestui que trusts* or for the protection of the trust property, it would be advisable that the sale should be made under judicial sanction.

CHARLES J. SMITH vs. GEORGE VREELAND and wife and others.

1. A gift of money to a married woman in 1848, being made without a settlement upon her, as well as her earnings during coverture, are the property of the husband.
2. A voluntary conveyance to a married woman by her husband, while he is embarrassed by debts, is fraudulent and void as against creditors.
3. Equity will protect the title of a *bona fide* purchaser for value, without notice of fraud, though he purchase from a person with notice.
4. A purchaser with actual or constructive notice of fraud, though he pay a valuable consideration, takes title subject to all the equities to which it was liable in the hands of the vendor. In such case he will not be per-

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mitted to protect himself against such claims, but his own title will be postponed and made subservient to them.

5. A purchaser is presumed to have knowledge of all the facts disclosed by the deeds under which he claims title.

6. A purchaser cannot claim to be a *bona fide* purchaser without notice, where the facts patent upon the face of his title and under his immediate observation, are sufficient to put him upon inquiry.

7. Where a creditor comes into equity to remove fraudulent encumbrances or conveyances out of the way of his execution at law, the effect of the decree is simply to declare the creditor's claim an encumbrance upon the property, in preference to the fraudulent encumbrance or alienation.

8. Where a party has proceeded to a sale under his execution at law, and become himself the purchaser of the property for a very inadequate consideration, the court will not set aside the prior conveyances, and perfect the title under the execution, to the prejudice of other judgment creditors. All that the complainant can ask in equity is the payment of his debt. If his legal rights are more extensive, they must be enforced at law.

The case was disposed of upon final hearing upon the bill, answer and proofs.

Weart, for complainant, cited 1 *Story's Eq. Jur.*, § 408, *a*, and note 5; *Dunlap's Paley's Agency*, (4th Am. ed.) 262 and notes; *Dart's Vendor* (*Waterman*) 404, 408, note 1, 407, note 2; *Newkirk v. Morris*, 1 *Beas.* 64; *Eameston v. Lyde*, 1 *Paige* 637; *Journeay v. Brown*, 2 *Dutcher*, 111; *Edwards on Receivers* 362; 2 *Barb. Ch. Pr.* 157; *Corning v. White*, 2 *Paige* 567; *McDermutt v. Strong*, 4 *Johns. Ch. R.* 687; *Wilson v. Allen*, 6 *Barb. S. C. R.* 545.

Fleming, for Vreeland and wife, cited *Roberts on Fraud. Con.*, ch. 4, § 10, p. 497; *Disborough v. Outcalt*, *Saxton* 298; *Broom's Leg. Max.* 561; *Jones v. Naughright*, 2 *Stockt.* 301; *Halsted v. Davison*, *Ibid.* 295; *Garr v. Hill*, 1 *Ibid* 215; *Owen v. Arvis*, 2 *Dutcher* 43; *Hendricks v. Mount*, 2 *South.* 743.

Slaight, for Mrs. Scott.

THE CHANCELLOR. The bill is filed by an execution creditor of David Scott, to set aside as fraudulent certain convey-

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ances, by which the legal title to the real estate of the debtor was transferred to Vreeland.

The judgments were originally obtained by Abraham T. Russell, upon two promissory notes made by Scott to Stephen W. Smith, and by him endorsed to Russell. The notes were given for debts due from Scott to Smith, and were discounted by Russell for the accommodation of the endorser. The judgment being unsatisfied, and Smith being liable as endorser for the debt, procured his brother, Charles J. Smith, to advance the money, and take an assignment of the judgment in his own name. Had the debt been paid by the endorser he would have been entitled in equity as surety, to all the securities held by the creditor against the debtor. If it be true as alleged in the answer, that Stephen W. Smith is the real complainant, striving to secure the payment of a debt from his debtor, he is clearly entitled to the benefit of the judgment. Charles J. Smith, the assignee of the judgment, is the owner in equity, and entitled to the same protection as the original plaintiff in the judgment. It is immaterial, therefore, which of the parties is the real complainant in the cause. The suit is obviously for the benefit of the endorser.

The defence set up by Scott and wife in their answer, cannot be sustained. When the suit was commenced against Scott, upon which the first judgment was recovered, he was the owner of considerable real and personal estate, and was embarrassed by debts, if not actually insolvent. On the twenty-second of September, 1860, the day on which the summons was returnable, he conveyed the real estate in question to David Bedford, by deed with covenants of general warranty, the wife joining with her husband in the conveyance. On the eighth of October, Bedford and wife reconveyed the premises to the wife of Scott. The consideration expressed in both deeds was \$4000. It is admitted by the answer that no consideration whatever was paid for either conveyance. The deeds were purely voluntary. Bedford admits that he had no interest in the premises. He took title merely for the benefit of the wife. This transaction is attempted to be

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justified by the allegation that in 1848, the wife received about \$500, as a gift from her mother, with which, for about seven years, she carried on the millinery business in her own name and on her own account, and was thereby enabled to advance money to her husband, with which the property in question was purchased. There is no evidence whatever in support of this allegation. If it were fully proved it constitutes no defence. The gift to the wife in 1848, being made without a settlement on the wife, as well as the earnings of the wife during coverture, are the property of the husband. A conveyance of the property to her, while the husband is embarrassed by debts, is fraudulent and void as against creditors. The subject was under consideration in the case of *Belford v. Crane*, decided at the present term, and in *Skillman v. Skillman*, 1 *Beas.* 403. It did not seem to be seriously contended by counsel upon the argument, that this title in Mrs. Scott was valid as against the creditors of the husband. But it was urged that Vreeland was a *bona fide* purchaser for value, without notice of the fraud, and that his title was therefore valid. The principle that a *bona fide* purchaser for value, without notice of the fraud may protect his title, though he purchase from a person with notice, is too clearly established to admit of question, 1 *Story's Eq.*, § 409, 410.

But the principle is equally clear, that if he purchase with actual or constructive notice of the fraud, though he pay a valuable consideration, he takes title, subject to all the equities to which it was liable in the hands of the vendor. In such case he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to them. 1 *Story's Eq.*, § 395.

Vreeland claims title under the wife, not under the husband. The purchase was made (so the answer alleges) from her. The husband was induced to join in the deed, merely because the deed of the wife without his consent, was void. He cannot make out his title but through the deed from Scott and wife to Bedford, and from Bedford back to Mrs. Scott,

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and he is presumed to have knowledge of all the facts which those deeds disclosed. 1 *Story's Eq. Jur.*, § 400.

He knew then that this property had been conveyed from Scott to Bedford for the alleged consideration of \$4000, and immediately thereafter reconveyed from Bedford to the wife for the same consideration. He knew that when the deed from Scott to Bedford was executed, Scott was overwhelmed with debt. Vreeland himself was among the number of his creditors. He knew that Mrs. Scott had no means of paying \$4000 for the property. He was familiar with the condition of her affairs, and had from time to time, before the execution of the deed, been advancing money at her instance to redeem the property from sales made for payment of taxes and assessments. He had, at her instance, purchased a mortgage upon the property, which was being pressed for payment. He knew that the deed from Scott to Bedford was promptly placed upon record, and that the reconveyance from Bedford to the wife was not recorded. It was in fact placed upon record at the same time with the deed from the wife to Vreeland. He is presumed to have known these facts, because a purchaser has no right, where the interests of others are involved, to close his eyes to facts patent upon the face of his title and under his immediate observation. They were at least sufficient to have put him upon inquiry, and to deprive him of the character of a *bona fide* purchaser without notice. It cannot be, where a husband on the eve of insolvency, pressed by his creditors, with actions pending against him, conveys to a third party who conveys directly back to the wife for the same alleged consideration, that a purchaser with knowledge of these facts can claim to be a *bona fide* purchaser without notice. The case is greatly strengthened when the purchaser appears to be a relative and friend of the wife, who claims that the legal title was made to her for the mere purpose of perfecting a previous equitable interest. It seems in the highest degree improbable that the purchaser should not have been fully acquainted

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with the real character of the deed from Bedford, and with the nature of the wife's title.

That Scott and his wife designed to protect this property from the husband's creditors, is abundantly evident. It is in fact avowed and attempted to be justified by their answer. There is persuasive evidence that there was complicity in this design between Vreeland and the Scotts. The judgment to Vreeland was confessed, and an execution levied upon the defendants' personal property, while the complainant's suit was pending. After the complainant's execution was issued, the entire personal property was sold and purchased by Vreeland, the proceeds being applied toward the satisfaction of the execution. On the first of March following, the property thus purchased was transferred to Mrs. Scott for \$850. The execution remained unsatisfied, no steps apparently having been taken by Vreeland to secure the balance of his debt. On the twenty-first of May, on the petition of the plaintiff in the complainant's judgment, an order was made by the judge of the Hudson Circuit for the examination of Scott, under the act to prevent fraudulent trusts and assignments. Of that fact the attorney of Vreeland had notice. The fact was immediately communicated to the attorney of Scott. The order was served on Scott on the twenty-second of May, but he failed to appear to be examined. Bedford, to whom Scott had conveyed, was examined on the twenty-ninth of May. On the twenty-eighth, the very day before his examination and the disclosure of the fact that the conveyance to him from Scott, and the reconveyance to Mrs. Scott, were voluntary, Scott and wife conveyed to Vreeland. The deed is dated on the preceding first of March, so as to appear to have been executed previous to the institution of proceedings against Scott for fraud. Notwithstanding the denials of the answer, it is difficult to reconcile these facts with the idea of good faith on the part of Vreeland in taking title.

I have had much difficulty in regard to the proper relief to be administered. It is usual for creditors, after exhaust-

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ing their legal remedy against property, the legal which is in the defendant, to come into equity to fraudulent encumbrances or conveyances out of the execution at law. In such case, the effect of the de simply to declare the creditors claim an encumbranc the property, in preference to the fraudulent encum or alienation. But in this case the complainant, proc on the assumption that the conveyances which he now to avoid were null and void, has proceeded to a sale his execution at law, although the title had been co out of the defendant in execution, and has himself l the purchaser for a very inadequate price. He no this court, by its decree, to declare the previous conve fraudulent, and thus confirm his title. The balance his judgments at the time of the sale, amounted to \$300. The value of the property, according to the tes of his witnesses, was \$3000, exceeding by about \$13 amount of the encumbrances upon it. The defendant a judgment creditor, having a balance due on his jud of over \$600, double the amount of the debt due to th plainant. The *bona fides* of this judgment has no called in question. The property is sufficient, accord the evidence, to satisfy both judgments. All that th plainant can ask in equity is, that his debt shall be If his legal rights are more extensive they must be er at law, without the aid of this court. Though he l quired a legal advantage over the prior judgment of defendant, there is no reason why he should be perm speculate upon that advantage at the expense of the ant. After the complainant's debt is satisfied, the t of the debtor's property should in equity be applied to the debt due to Vreeland.

The legal fraud imputed to him involves no moral tude. He may have been prompted by honest mot his attempt to shield property to which the wife c title, against the claims of the husband's creditors. A the complainant can demand is, that his judgment sha

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stitute a lien upon the property in the hands of Vreeland. Upon that claim being satisfied, his title to the property should be surrendered. If the claim of the complainant be not satisfied, the property will be decreed to be sold, subject to legal encumbrances, and the proceeds applied to satisfy first the judgment of the complainant, and then the judgment of Vreeland.

WILLIAM R. SAYRE and others *vs.* NICHOLAS J. FREDERICKS
and others.

1. The eleventh section of the "act for the prevention of frauds and perjuries," *Nix. Dig.* 330, requiring trusts to be in writing, in terms applies only to trusts of *lands*. It does not extend to trusts of *personality*.
 2. A mortgage of land is a mere security for the payment of the debt, and is not a conveyance within the statute of frauds, so as not to be assignable without writing.
 3. A mortgage given to secure a debt to other persons than the mortgagor, operates as a resulting trust, by implication of law, in their favor, which is expressly excepted from the operation of the statute.
 4. Parol evidence, to raise an express trust upon the terms of a written instrument, is received with great caution, and must be very clear to warrant a court in establishing the trust.
 5. Whether a conveyance be fraudulent or not, depends upon its being made upon good consideration and *bona fide*. If it be defective in either particular, although valid between the parties and their representatives, it is void as to creditors.
 6. A denial by the answer of the existence of fraud, will not avail to disprove it, where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable conclusion.
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Keasbey, for complainants, cited *Nix. Dig.* 330, § 11; *Knight v. Packer*, 1 *Beas.* 214; *Emerick v. Harlan*, *Ibid.* 229; *Owen v. Arvis*, 2 *Dutcher* 22.

Runyon, for defendants.

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THE CHANCELLOR. The complainants are execution creditors of Nicholas J. Fredericks upon three several judgments, amounting to about \$500. When these debts were incurred, the debtor owned real estate in Newark to the value of about \$3000, subject to encumbrances amounting to \$1200. After the first suit was instituted, and before judgment was recovered, the debtor mortgaged the land to Effy Clark for \$1248, and conveyed the fee to Daniel F. Conklin, the other defendant, for the alleged consideration of \$350. The bill charges that the mortgage and the deed are fraudulent and void as against creditors. The answer denies the fraud, and alleges that the mortgage was given *in trust* to secure debts due from the mortgagor to the heirs of his father, and that the deed was given in payment of a debt due from the grantor to the grantee.

It is objected that the trust is not in writing, and therefore void under the eleventh section of the act for the prevention of frauds and perjuries. *Nix. Dig.* 330, § 11.

The statute in terms applies only to trusts of *lands*. It does not extend to trusts of personalty. *Nab v. Nab*, 10 *Mod.* 404; *Roberts on Frauds* 94.

The debt is the subject of the trust. The mortgage is a mere security for the payment of the debt. The assignment of the debt carries with it the mortgage as a consequence. A mortgage of land is not a conveyance within the statute of frauds, so as not to be assignable without writing. *Martin v. Mowlin*, 2 *Burr.* 969; *Browne on Stat. of Frauds* 65; 2 *Story's Eq. Jur.*, § 1016; 4 *Kent's Com.* 159.

If the mortgage was in fact given to secure a debt due to other persons than the mortgagee, there would be a resulting trust by implication of law in their favor, which is expressly excepted from the operation of the statute. *Nix. Dig.* 330, § 12.

Mr. Eden, in his note to *Fordyce v. Willis*, 3 *Brown's Ch-R.* 588, states that declarations of trust of personal property are in the same situation as all declarations of trust were before the statute. But that he has not been able to find any

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instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution. And although the statute does not extend to trusts of personality—and although it is at this day well settled that trusts by implication may, by parol, be engrrafted upon a written instrument against the terms of the deed itself, parol evidence, to raise an express trust upon the terms of the instrument, is received with great caution, and must be very clear to warrant a court in establishing the trust. *Fordyce v. Willis*, 3 Bro. Ch. R. 577; *Roberts on Frauds* 94; 4 *Kent's Com.* 305; 1 *Greenl. Ev.*, § 266.

The mode of establishing the trust is obviously a question which concerns the trustee and *cestui que trust* rather than a stranger, and with which the creditor in this case has in fact no concern, save as it may incidentally affect the question of the *bona fides* of the conveyance.

Nor can the mortgage be assailed by the creditor on the ground that it is in the nature of an assignment for the payment of debts, and therefore void, inasmuch as it prefers certain creditors over others. The real question in the cause is, whether the conveyances were made in good faith, or whether they were designed to protect the debtor's property from his other creditors, and on that account fraudulent and void. The case rests entirely upon the answer of the defendants—the debtor and his alienees, and the testimony of the debtor himself. The admitted facts are, that the mortgage and the deed were made upon the same day, and that they covered the whole of the defendant's real estate. The personal estate was covered and subsequently exhausted by executions issued upon confessed judgments. At the time of the conveyance a suit by the complainants was pending against the debtor for the recovery of a part of their debt. The debtor was insolvent. The mortgage was made to his sister. The deed to his brother-in-law. The mortgage was given in terms to secure a debt of \$1248, due to the mortgagee. The instrument is silent as to any trust. The answer

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admits that no such debt was due to the mortgagee. It is true, up, by way of consideration for the mortgage, that it was in fact given in payment of a debt due from the mortgagor to his brothers and sisters, being the proceeds of the sale of a tract of land belonging to their father, which had been sold by the mortgagor, and the proceeds never accounted for by the heirs-at-law. That sale was made in 1843, eight years and six months before the mortgage was given. The land sold for \$700. The mortgagor, as one of the heirs, entitled to one seventh of the amount. The mortgage given for the residue of the proceeds of the sale, with eighteen years and six months interest, no deduction appearing to have been made for commissions, or for the costs and pences of the sale. No settlement of the account had ever been made. The amount due the heirs had never been ascertained. There was no written recognition of the existence of the indebtedness. No payment had ever been made in account of it. When the mortgage was given, no receipt or discharge for these claims was given by the mortgagee to the mortgagor. The other heirs, for whose benefit the mortgage is pretended to have been given, were not present. They lived, many of them, in remote parts of the country. They were not consulted in regard to it. They had no knowledge of the transaction, and, so far as appears, were never notified of the alleged trust in their behalf. Their rights were in nowise protected or even recognized by the terms of the mortgage. One of the heirs was dead, leaving infant children. No provision was made by which their rights could be ascertained or enforced. The arrangement was made upon the advice of counsel.

Admitting the competence of parol evidence to establish the trust, what evidence could have been produced to overcome the terms of the deed, sustained by the evidence of the mortgagor? What honest trustee would have consented to accept a trust upon such terms? What intelligent counsel would have advised or sanctioned it? Is it credible

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such a transaction ever could have occurred, with or without the sanction of counsel, if it were designed in good faith to secure debts due to the heirs? May it not safely be assumed, not only as probable but as certain, that no such idea was in contemplation at the time of the execution of the mortgage? The deed cotemporaneously made to the brother-in-law of the debtor, was for the alleged consideration of \$350. The real consideration is admitted to have been a promissory note of the debtor to James Conklin, bearing date on the tenth day of July, 1852, for \$228.21, with interest from date. No payment of principal or interest had been made on account. The evidence shows that it had long been regarded as of no value. The grantee had no need for the premises and no desire to purchase. The grantor had no desire to sell or to part with the possession of the property. He in fact continued to occupy it after the sale, as he did before. It is difficult to conceive of a case having more unequivocal badges of fraud. It is impossible, I think, to look at the admitted facts of the case without a conviction that the conveyances of the property by the debtor were not made in good faith for the purpose of paying his debts, but were designed to protect the property from the claims of other creditors.

It is no answer to say that debts barred by the statute of limitations may constitute a valuable consideration for a conveyance. The real question is, whether the transaction was in good faith. If it was not, it is no matter what the consideration was. Whether a conveyance be fraudulent or not, depends upon its being made upon good consideration *and bona fide*. It is not sufficient that it be upon good consideration or *bona fide*; it must be both. If a conveyance be defective in either particular, although valid between the parties and their representatives, it is void as to creditors.

1 Story's *Eq. Jur.*, § 353.

Nor does it at all militate against this conclusion that the answer denies the existence of fraud. Constructive fraud is

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not a fact, but a conclusion of law from ascertained facts. Although the answer denies the fraud, it nevertheless admits facts from which the existence of fraud follows as a natural and legal, if not a necessary and unavoidable conclusion.

The complainants are entitled to relief.

PETER F. DIERCKS *vs.* SAMUEL KENNEDY.

1. It is no valid objection to a defence of usury, that the mortgage sought to be foreclosed was given for a part of the *purchase money* upon a contract for the sale of land, and not for a *technical loan of money*.
 2. The taking of illegal interest, either upon a lending of money, or upon the forbearance of a debt, constitutes usury.
 3. The forbearance, or giving time for the payment of a debt, is in substance a loan.
 4. Where the contract upon its face is strictly legal, it will not be presumed that the parties had in contemplation an illegal stipulation.
 5. Where a debtor wilfully admits a greater liability than actually exists, or conceals the equity or defence on which he subsequently relies, such concealment or admission will be absolutely conclusive in favor of an assignee, if acted on by him in accepting the assignment.
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Beasley, for complainant.

Williamson, for defendant.

Cases cited by complainant's counsel. *McMurtry v. Giveans*, 2 *Beas.* 251; *McIntyre v. Parks*, 3 *Metc.* 207; 2 *Parsons* 384; *Floyer v. Edwards*, *Couper* 112; *Beete v. Bidgood*, 7 *Barn. & Cress.* 453; *Van Schaick v. Edwards*, 2 *Johns. Cas.* 355; *Bank of United States v. Waggener*, 9 *Peters* 401; *Durant v. Banta*, 3 *Dutcher* 624; *Tate v. Wellings*, 3 *T. R.* 538; *Barclay v. Walmsley*, 4 *East* 55; *Brooks v. Avery*, 4 *Const.* 225; *Berry v. Walker*, 9 *B. Mon.* 464; *Shirkey v. Hunt*, 18 *Teras* 883; *Hoyt v. Bridgewater Copper Mining Co.*, 2 *Halst. Ch. R.* 253; *Ibid.* 625; 3 *Lead.*

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Cases in Eq. 370; *Petrie v. Feeter*, 21 Wend. 172; *Watson's Ex's v. McLaren*, 19 Wend. 557; *Davison v. Franklin*, 1 Barn. & Ad. 142; 1 *Story's Eq. Jur.*, § 191-2-3; *Ross v. Elizabethtown and Somerville R. R. Co.*, 1 *Green's Ch. R.* 434; *Berrisford v. Milward*, 2 *Atk.* 49; *East India Co. v. Vincent*, *Ibid.* 83; *Hobbs v. Norton*, 1 *Vern.* 136; *Mocatta v. Murgatroyd*, 1 *P. W.* 392; *Wendell v. Van Rensselaer*, 1 *Johns. Ch. R.* 353; *Parshall v. Lamoureux*, 11 *Am. Law Reg.* 186, (*Jan.* 1863).

THE CHANCELLOR. The only defence to the suit is that the mortgage sought to be foreclosed is usurious. It is no valid objection to the validity of the defence that the mortgage was given for a part of the purchase money, upon a contract for the sale of land, and not for a technical loan or lending of money. Usury, according to Sir Edward Coke, is a contract upon a loan of money, or giving days for forbearance of money, debt, or duty, by way of loan, chevisance, shifts, sales of wares, or other doings whatsoever. 3 *Inst.* 151, c. 70; *Comyn on Usury* 1.

The taking of illegal interest, either upon a lending of money or the forbearance of a debt, constitutes usury. The forbearance or giving time for the payment of a debt, is in substance a loan. *Spurrier v. Mayoss*, 1 *Vesey* 531; *Dewar v. Spain*, 3 *Term R.* 425; *Van Schaick v. Edwards*, 2 *Johns. Ch.* 355.

That this is the legislative construction of our statute in regard to usury, is very clear from the language of the various enactments upon the subject. The original act against usury, *Nix. Dig.* 401, § 1, prohibits the taking of more than six per cent. only upon a contract for loan of money, wares, &c. The various supplements to the act authorizing a higher rate of interest, include in terms not only a loan, but also "the forbearance or giving day of payment for any money, wares," &c. *Nix. Dig.* 402, § 7, 8; *Pamph. L.*, 1858, 34.

If the original act had not been understood to include the

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forbearance or giving day of payment for a debt, the phology of the supplements would have been superfluous unmeaning.

In this case moreover, the rate of interest forms no part of the contract for the exchange of lands. The written contract stipulates merely for the giving of mortgages, silent both as to the time of payment and the rate of interest. The written contract cannot be changed by parol much less will it be presumed, where the contract upon its face is strictly legal, that the parties had in contemplation an illegal stipulation. The mortgagee testifies that there was a parol agreement made between himself and the mortgagor, that seven per cent. interest should be paid upon the mortgage. This verbal contract was made in the county of Union. I find no evidence whatever to show where the bond and mortgage were executed. If the parol agreement to take interest at the rate of seven per cent. was made in the county of Union, where the mortgagor resided, and the bond and mortgage were executed there, the contract is clear of usury. *McMurtry v. Giveans*, 2 Beas. 351.

The legality of the mortgage cannot be impaired by the fact that the written contract for the exchange of lands was executed elsewhere.

I think, therefore, that there is an entire failure of evidence to show that the contract is usurious. But admitting the mortgage to have been tainted with usury, can the defendant avail himself of the defence?

Upon the assignment of the mortgage by Riggs, the original mortgagee, to Diercks, the complainant, the mortgagee gave a written certificate that the mortgage was a good and valid lien upon the premises; that it was given for a part of the purchase money, and that there then existed no legal or equitable defence thereto. Upon the faith of that representation the complainant took an assignment of the mortgage. There is no pretence that he was aware of the invalidity of the contract. The defendant is estopped in equity by his own representation from setting up the defence of usury.

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Where a debtor wilfully admits a greater liability than actually exists, or conceals the equity or defence on which he subsequently relies, such concealment or admission will be absolutely conclusive in favor of the assignee, if acted on by him in accepting the assignment. *Davison v. Franklin*, 1 *Barn. & Ad.* 142; *Watson's Ex'r's v. McLaren*, 19 *Wend.* 557; 3 *Lead. Cases in Eq.* (*Am. ed.*, 1859,) 370, and cases there cited.

In accordance with this principle, it was held by the Supreme Court of New York in *Parshall v. Lamoureux*, that if the holder of a note, on the occasion of its sale and transfer, represents to the purchaser that it was given for a valuable consideration, and the purchaser takes it upon the faith of such representation and in ignorance of the fact that the note has never had a legal existence, the holder will be estopped from availing himself of the defence of usury. 37 *Barb.* 189; *Amer. Law Reg. for January*, 1863, p. 186.

The principle upon which this doctrine rests admits of a much broader application and is founded upon the clearest equity. 2 *Smith's Lead. Cases*, (*Am. ed.*, 1844,) 467; 1 *Story's Eq.*, § 191-3.

The complainant is entitled to a decree.

GEORGE M. WAY vs. ISAAC A. BRAGAW and others.

1. A bill filed to obtain satisfaction of a judgment at law is not demurable on the ground of multifariousness, because it seeks to remove fraudulent conveyances and encumbrances, and also to bring within the reach of the judgment, equitable interests which are not the subjects of execution at law.

2. Where the case made by the bill is so entire, that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case as stated, neither of the defendants can demur for multifariousness or for a misjoinder of causes of action, in some of which he has no interest.

3. Where a judgment creditor files a bill in equity to obtain aid in en-

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forcing the payment of his judgment at law, it is no ground of demurrer that other creditors, not in equal degree, are not made parties to the bill.

4. A plea of another suit depending for the same cause in bar of a suit in equity, can only be of a suit depending in the same, or in some other court of equity.

5. Where a suit is pending for the same cause in a court of law, all that the defendant can ask, is an order putting the complainant to his election, whether he will proceed at law or in equity.

6. The complainant will not be put to his election, unless the suit at law is for the same cause, and the remedy afforded co-extensive and equally beneficial with the remedy in equity.

Parker, for defendants, in support of the demurrer, as to the question of multifariousness, cited *Story's Eq. Pl.*, § 271-286-530-540-747; *Fellows v. Fellows*, 4 Cowen 682; *Brinkerhoff v. Brown*, 6 Johns. Ch. R. 139.

Beasley, for complainant, contra.

As to multifariousness. *Attorney General v. Corporation of Poole*, 4 Mylne & C. 31; *Turner v. Robinson*, 1 Sim. & Stu. 314; *Cuyler v. Moreland*, 6 Paige 274; *Brinkerhoff v. Brown*, 6 Johns. Ch. R. 139; *Fellows v. Fellows*, 4 Cowen 682.

As to rule of convenience. *Campbell v. Mackay*, 1 Mylne & C. 603; *Gaines v. Chew*, 2 How. 619; *Oliver v. Piatt*, 3 *Ibid.* 333; *Story's Eq. Pl.*, § 534; 2 *Dev. & Bat. Ch. R.* 31.

Suit at law cannot be pleaded in bar of a suit in equity. *Mitford's Eq. Pl.* 250; *Rogers v. Vosburgh*, 4 Johns. Ch. R. 84; *Jones v. Earl of Strafford*, 3 P. Wms. 90. The practice was formerly otherwise. *Beames' Orders* 177.

The party must elect which remedy he will pursue. 1 *Hoffman's Ch. Pr.* 342; *Tillotson v. Ganson*, 1 Vern. 103; *Jones v. Earl of Strafford*, 3 P. Wms. 90; *Hinde's Ch. Pr.* 178; 2 *Daniell's Ch. Pr.* 722; *Ex'r's of Conover v. Conover*, *Saxton* 409.

Prior suit no bar, unless the objects of the second suit are completely attainable in such prior suit. 2 *Daniell's Ch. Pr.* 721; *Law v. Rigby*, 4 Bro. Ch. R. 60; *Pickford v. Hunter*, 5 *Simons* 122; *Crofts v. Wortley*, 1 *Chan. Cases* 241; *Story's Eq. Pl.*, § 739, 742; *Hertell v. Van Buren*, 3 *Edw. Ch. R.* 20.

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THE CHANCELLOR. The bill is filed by a judgment and execution creditor of Bragaw, one of the defendants, to obtain the aid of this court in enforcing the payment of his judgment at law. The bill charges that the real estate of the debtor defendant is covered by a fraudulent conveyance, made on or about the first of April, 1861, to Charles P. Holcombe, one of the defendants. That personal estate of the debtor to a large amount is held by one Wesley Benner, under a claim of title derived from a collusive and fraudulent sale under a pretended judgment and execution of said Benner against the debtor; and that the debtor also holds certain equitable interests and property which his execution at law will not reach. The prayer of the bill is that the conveyance of the real estate to Holcombe, and the pretended title of Benner to the personal estate, may be declared fraudulent and void, and that the property, legal and equitable of the debtor, may be applied in satisfaction of the complainant's judgment. To this bill there is a demurrer by Holcombe and Benner, and a plea by Bragaw.

The first ground of demurrer is that the bill is multifarious. The sole purpose of the bill is to enable the complainant to obtain satisfaction of his judgment at law out of the property of the defendant. To this end the complainant seeks to remove out of his path fraudulent conveyances and encumbrances, and to bring within the reach of his judgment equitable interests which are not the subjects of execution at law. These objects may properly be united in the same bill. *Cuyler v. Moreland*, 6 *Puige* 273.

Nor is the bill multifarious because it seeks to set aside as fraudulent, distinct conveyances or encumbrances upon the defendants' property, in favor of two or more different persons.

The grounds of suit are not wholly distinct and unconnected. They form parts of a series of transactions, or of a course of dealing by which it is alleged that the debtor is seeking to defraud his creditors. They all tend to one end, the defeat of the plaintiff's claim, and although it is sought

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to set aside two distinct encumbrances, they are necessarily connected not only in their operation against the complainant's remedy at law, but in the relief which is to be administered. On a decree in favor of the complainant again both, the real estate can only be sold to pay the balance remaining due after the application of the personal estate to the complainant's claim.

So the defendants are united in a common design. Each is charged with colluding with the debtor in order to defraud his creditors.

Where there is one entire case stated as against the debtors it is no objection that one or more of the defendants, whom parts of the property have been fraudulently conveyed, had nothing to do with other fraudulent transaction. The case against the debtor is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case stated. In such case neither of the defendants can demur for multifarioussness, or for a misjoinder of causes of action, in some of which he has no interest. *Attorney General v. The Corporation of Pool*, 4 Mylne & C. 31; *Brinkerhoff v. Brown*, 4 John Ch. R. 671; *Fellows v. Fellows*, 4 Cowen 682; *Boyd Hoyt*, 5 Paige 65; *Turner v. Robinson*, 1 Sim. & Stu. 31; *Story's Eq. Pl.*, § 271, b.

In *Boyd v. Hoyt*, 5 Paige 78, Chancellor Walworth states the rule thus: "Where the object of a suit is single, but different persons have a claim to have separate interests distinct or independent questions, all connected with and arising out of the single object of the suit, the complainant may bring such different persons before the court as defendants, so that the whole object of the bill may be obtained in one suit, and to prevent further unnecessary and useless litigation."

The second ground of demurrer is, that the bill should be for the benefit of all the creditors of Bragaw jointly with the complainant.

The same objection was raised under similar circumstan-

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in *Edgell v. Haywood*, 3 *Atk.* 357. But Lord Hardwicke said: "The person who first sues has an advantage by his legal diligence in all cases. The complainant, by his judgment and execution at law, and by his diligence in this court, has obtained a position which entitles him to priority over the other creditors of the debtor. He does not stand in the attitude of a complainant in an ordinary creditor's bill. It does not appear that there is any other creditor of equal degree with the complainant." *Clarkson v. Depeyster*, 3 *Paige* 320; *Parmelee v. Egan*, 7 *Paige* 610; *Grosvenor v. Allen*, 9 *Paige* 74; *Farnham v. Campbell*, 10 *Paige* 598.

The debtor has pleaded in bar of the suit, proceedings pending in the Supreme Court under the provisions of the act to prevent fraudulent trusts and assignments. *Nix. Dig.* 271, § 23.

A plea of another suit depending for the same cause in bar of a suit in equity, can only be of a suit depending in the same, or in some other court of equity. *Mitford's Pl.*, (by Jeremy) 236, 246, notes i, k.

Where a suit is pending for the same cause in a court of law, all that the defendant can ask is an order putting the complainant to his election, whether he will proceed at law or in equity. *Ex'r's of Conover v. Conover*, *Saxton* 409; *Rogers v. Vosburgh*, 4 *Johns. Ch. R.* 84; 1 *Hoffman's Ch. Pr.* 342; *Story's Eq. Pl.*, § 742.

Such election has virtually been made. If it be conceded as alleged in the defendant's plea, that the order made by the justice by whose direction the proceedings at law were instituted for the discontinuance of those proceedings, was inoperative, not having been made by the Supreme Court in which the suit was pending, still it may safely be assumed that the order for discontinuance having been made at the instance of the complainant, and proceedings having since been commenced by him in equity, he would not be permitted to proceed at law to the prejudice of the defendants' rights. This court will, under the circumstances, regard the election as in fact made.

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If the proceedings of the Supreme Court could be regarded as a suit in equity, and in this respect the defendant's plea be free from objection, the plea cannot be sustained. It is obvious from an examination of the complainant's bill and of the statute under which the proceedings at law were instituted, that the remedy in the two suits cannot be co-extensive.

The former suit must not only be for the same cause, but the effect must be the same. The remedy must be co-extensive, and equally beneficial to the complainant. *Law v. Rigby*, 4 Brown's Ch. R. 63; *Pickford v. Hunter*, 5 Simons 122; 2 Daniel's Ch. Pr. 721.

The receiver, if appointed at law, must come into equity to attain the end which is sought to be attained by the present suit.

The plea and demurrers are overruled.

CAROLINE NORRIS and others *vs.* THE EXECUTORS OF JOHN R. THOMSON and others.

1. To constitute a specific legacy, the thing bequeathed must be *specified* and *distinguished* from the rest of the testator's estate.
2. The *intention* of the testator must be expressed in reference to the thing bequeathed, or it must otherwise clearly appear from the will.
3. To guard against an ademption or extinguishment of the legacy, contrary to the intention of the testator, the general leaning of the court is against making the legacy specific.
4. A bequest of government securities, or of shares in public companies, or of bonds of corporations outstanding and circulating as well known securities at the date of the will, is not a specific bequest, unless there is a clear reference to the *corpus* of the fund.
5. A legacy may be rendered specific by the use of the term "*my*" stock, or the stock now "*in my possession*," or "*standing in my name*," or "*owned by me*," or by any other form of expression which clearly indicates the purpose of the testator to give the *specific thing*, and not to designate the quantity or species of the thing bequeathed.
6. If, by the terms of the will, there be no such identification of the

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thing bequeathed the legacy is general, and if not found in the possession of the testator at his death, is tantamount to a direction to the executors to purchase such securities for the legatee.

7. The mere possession by the testator, at the date of his will, of a larger amount of stocks or bonds than are bequeathed, will not make the bequest specific, when it is given generally of stocks, or of stocks in particular funds without further explanation.

8. The nature of the legacy, whether general or specific, will be found always to depend upon the terms of the gift to the legatee, without reference to the circumstance, whether the estate was, or was not put in trust.

The bill in this cause was filed by consent to settle the construction of the will of John R. Thomson, deceased. The question was as to the character of certain legacies therein given; whether general or specific.

Zubriskie, for complainants.

Bradley, for defendants.

Cases cited by complainants counsel. *Alsop's appeal*, 9 Barr 374; *Blackstone v. Blackstone*, 3 Watts 335; *Foote v. Worthington*, 22 Pick. 299; *Ludlam's estate*, 1 Parsons' Eq. R. 116; 1 *Harris* 192; 2 *Williams on Ex'rs* (ed. 1859) 1045; *Ashburner v. Macguire*, 2 *Lead. Cases in Eq.* (3d Am. ed.) 482; *Jeffrys v. Jeffreys*, 3 *Atk.* 120; *White v. Winchester*, 6 *Pick.* 47; *Cuthbert v. Cuthbert*, 3 *Yeates* 486; *Hosking v. Nicholls*, 1 *Young & Coll.* 478; *Mullens v. Smith*, 2 *Drewry & Smale* 210; 2 *Williams on Ex'rs* 1283.

Cases cited by defendants counsel. *Ashburner v. Macguire*, 2 *Lead. Cases in Eq.* (3d Am. ed.) 482; *Coleman v. Coleman*, 2 *Vesey* 689, note; *Stout v. Hart*, 2 *Halst.* 422; 1 *Roper* 191, 192, note 1; 2 *Williams on Ex'rs* (5th ed.) 1043, 1045; 1 *Roper* 204, note 3; *Cuthbert v. Cuthbert*, 3 *Yeates*, 486; 1 *Roper* 205-213-214; 2 *Williams on Ex'rs* (5th ed.) 1047; *Tift v. Porter*, 4 *Seld.* 516; *Sibley v. Perry*, 7 *Vesey* 529; *Robinson v. Addison*, 2 *Beav.* 515; *Mathis' Ex'r v. Mathis*, 3 *Harr.* 66.

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THE CHANCELLOR. The bill is filed by the legatees of certain bonds and shares of stock under the will of John R. Thomson, deceased, to recover, as part of their respective legacies, the dividends, interest, and income accrued and accruing, on the respective bonds and shares of stock since the death of the testator. The sole issue made by the pleadings is, whether the legacies in question are specific or general. If specific, it is admitted that the complainants are entitled to the income from the death of the testator. 2 *Williams on Ex'rs*, (ed. 1849) 1221; 2 *Roper on Leg.* 1250.

The bequests are as follows, *viz.* "All the rest and residue of my real and personal estate, of whatsoever nature or kind, or wheresoever situate, I give, devise, and bequeath to John M. Reed, Charles Macalester, and Alexander H. Thomson, their heirs, executors, and administrators, in trust for the following uses and purposes:

"First. To give to my sister, Mrs. Caroline Norris, two hundred and fifty shares of the capital stock of the New York and Baltimore Transportation Line; to my sister, Adeline Thomson, two hundred and fifty shares of the capital stock of the said line; to my sister, Amelia Reed, wife of the Hon. John M. Reed, two hundred and fifty shares of the capital stock of the said line; to my nephew, Alexander Hamilton Thomson, one hundred and twenty-five shares of the capital stock of the said line; and to my niece, Elizabeth Norris, one hundred and twenty-five shares of the capital stock of the said line.

"Secondly. I give to my friends, John M. Reed, William H. Gatzmer, Richard Shippen, Dr. Phineas I. Horwitz, and Joseph P. Norris, the husband of my sister, Caroline Norris, five bonds of one thousand dollars each, of the Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transportation Company, redeemable in 1889; one bond to each one of the above named legatees."

The admitted facts are that the testator, at the date of his will and at the time of his death, owned and possessed certain shares of the New York and Baltimore Transporta-

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tion Line, exceeding in number the amount thereof so bequeathed by him; and also certain bonds of the Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transportation Company, redeemable in 1889, exceeding the number bequeathed as aforesaid; and also sundry other of such joint bonds, redeemable in other years. At, and for a long time prior to, the making of the said will, there were outstanding and circulating, as well known securities in the stock market in Philadelphia and elsewhere, large amounts of the bonds of the said Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transportation Company, which had been issued at different periods, and were payable respectively in different years, from 1863 to 1889, inclusive, all of which were the joint bonds of said companies. The testator was loan agent of the said joint companies for several years next prior to his death, having his office as such agent in Philadelphia, and often negotiated bonds of the said companies on their behalf. The will is dated on the twentieth of July, 1862. The testator died at Princeton, in this state, the place of his domicil, on the twelfth of September, in the same year.

The general principles which must control in the determination of this question, are familiar and well settled. The authorities are very numerous, and will be found collected in the elementary treatises to which reference is made.

To constitute a specific legacy, the thing bequeathed must be specified and distinguished from the rest of the testator's estate. *Purse v. Snaplin*, 1 *Atk.* 417; *Stephenson v. Dowson*, 3 *Beav.* 349.

The intention of the testator must be expressed in reference to the thing bequeathed, or it must otherwise clearly appear from the will. 1 *Roper on Leg.* 192, 204; 2 *Williams on Ex'rs* 995.

To guard against an ademption or extinguishment of the legacy, contrary to the intention of the testator, the general leaning of the court is against making the legacy specific.

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Ex'rs of Cogdell v. Devisees of Testator, 3 *Dess.* 373; *Foote, app't*, 22 *Pick.* 302.

In the application of these principles, it is a settled rule of construction that a bequest of government securities, or shares in public companies, is not a specific bequest, unless there is a clear reference to the *corpus* of the fund. 1 *Roper on Leg.* 214.

The same principle is clearly applicable to the bonds of corporations which, at the date of the will, were outstanding and circulating, as well known securities in the stock market.

To make a legacy of such stocks or securities specific, there must be something upon the face of the will to individualize them, and to distinguish them from all others of the same kind. Thus the legacy may be rendered specific by the use of term "my" stock, or the stock, or part of the stock, now "in my possession," or "standing in my name," or "owned by me," or by directing it to be sold and converted into money, or by any other form of expression which clearly indicates the purpose of the testator to give the specific thing, and not to designate the quantity or species of the thing bequeathed. 2 *Williams on Ex'rs* 997; 1 *Roper on Leg.* 204.

If by the terms of the will there be no such identification of the thing bequeathed, the legacy is general; and if not found in his possession at his death, is tantamount to a direction to the executors to purchase such securities for the legatee.

And the mere possession by the testator, at the date of his will, of a larger amount of stocks or bonds than are bequeathed, will not make the bequest specific, when it is given generally of stocks, or of stocks in particular funds, without further explanation. 1 *Roper on Leg.* 205; 2 *Williams on Ex'rs* 999.

In the various legacies to the complainants, the language used by the testator is of the most general character, merely sufficient to indicate the species of the thing bequeathed. There is nothing to indicate any purpose, much less a "clear

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intention" on the part of the testator, to bequeath the particular shares of stock or bonds held by him at the date of the will, or any other specific shares or bonds of the species designated. The legacy unquestionably by its terms is *general*, not *specific*.

The construction of the will is in no wise affected by the fact that the estate of the testator was given to trustees for the purposes of his will. This incident will be found in many of the reported cases, but it is never relied upon, or even adverted to, as of any significance upon the question of construction. The nature of the legacy, whether general or specific, will be found always to depend upon the terms of the gift to the legatee, without reference to the circumstance whether the estate was, or was not, put in trust.

But it is urged that the testator, by his will, gave to the trustees, with the *corpus* of his estate, the stocks and bonds in question, in trust to give shares and bonds of the designated species included in the trust fund, to the various legatees. And it is said that the case is analogous to that of a bequest of the testator's library, in trust to give Boydell's Shakspeare to A, and the Edinburgh Encyclopaedia to B. The cases would be analogous if the testator had made a specific bequest of his bonds and stocks in trust to be distributed among his legatees. But the decisive answer to this view of the case is, that the bequest of the entire *corpus* of an estate, or residue of an estate, is never deemed a specific legacy of the whole, or of any portion, of the property included in the bequest.

There are two other clauses in the will, which are relied on as indicating an intention on the part of the testator to make the legacies to the complainants specific.

By the first of these clauses, the testator directs that from the income of the residue of his estate, there shall be paid an annual sum of \$10,000 to his wife; and by the second, he further directs that if the income from his estate, after the payment of the bequests before made (including the bequests to the complainants), shall exceed the sum of \$10,000 a year,

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the surplus should be invested, &c. It is argued that these clauses do not include the income of the legacies in question, and if the income does not pass to the respective legatees, with the principal, then as to such income the testator died intestate. But if it be admitted that this is the strict literal import of the language used, yet it cannot I think be questioned, that using the term "residue" in its ordinary and natural sense, the language is equally appropriate, and would have been used by the testator, whether the previous legacies were general or specific. They are at the utmost of doubtful import, and cannot serve to indicate a "clear intention" on the part of the testator to make the legacies specific.

If these legatees were now before the court claiming the payment of these legacies, and it should be made to appear that all the shares of stock, and all the bonds, of the kinds bequeathed, had been sold by the testator in his lifetime, I think it never could be held, under the terms of the will, that it was the intention of the testator that those legacies to his nearest relatives and chosen friends should be extinguished, and the favorite objects of his bounty deprived of all benefit under the will. And yet this must have been the result if these legacies are specific. The character and incidents of the gift are fixed by the terms of the bequest, and cannot depend upon the effects which may result, whether beneficial or prejudicial to the interests of the legatee.

The legacies to the complainants are not specific, and the legatees, consequently, are not entitled to the accrued and accruing dividends and income thereon.

ADMINISTRATOR OF CATHARINE C. YOUNG vs. AARON H.
RATHBONE.

1. A court of equity ought not to enforce the specific performance of a contract for the purchase of land, under a sale which a competent tribunal had pronounced unauthorized and illegal.

2. The judgment or decree of a court of general jurisdiction, upon a

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subject matter within its jurisdiction, is final and conclusive, and can never be questioned in a collateral suit.

3. But where the order or decree is not an error of judgment, but an usurpation of power, it is not conclusive, and may be drawn in question in a collateral proceeding.

4. A court of equity, in the exercise of its discretion, will not compel a purchaser to accept a title depending upon an illegal and invalid sale, while it remains open to review, although the judgment unreversed might be conclusive upon the party's rights.

5. Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. Specific performance is frequently decreed, where the terms for the completion of the contract have not, in point of time, been strictly complied with.

6. Where the time fixed for the delivery of a deed has passed and circumstances have materially changed, a vendee acting in good faith will not be compelled to accept a deed against his will, which he was ready and willing to accept at the time fixed for the performance of the contract.

On final hearing.

Zabriskie, for complainant.

Ransom and Scofield, for defendant.

Cases cited by complainant's counsel. *Kempe's Lessee v. Kennedy*, 5 Cranch 173, 186; *Ex parte Watkins*, 3 Peters 193, 202; *Voorhees v. Bank of United States*, 10 Peters 449, 472; *Hartshorne v. Johnson*, 2 Halst. R. 108; *Den v. Zellers*, *Ibid.* 153; *Den v. O'Hanlon*, 1 Zab. 582; *Den v. Gaston*, 4 *Ibid.* 818, 820; *Den v. Hammel*, 3 Harr. 73; *Diehl v. Page*, 2 Green's Ch. R. 143; *Pittenger v. Pittenger*, *Ibid.* 156, 166; *Stokes v. Middleton*, 4 Dutcher 32, 35; *Runion v. India Rubber Co.*, 4 Zab. 473, 476; *Stevens v. Enders*, 1 Green's R. 271, reviewed.

Cases cited by defendant's counsel. *Stevens v. Enders*, 1 Green's R. 271; *Van Riper v. Berdan*, 2 Green's R. 139; *State v. Rickey*, 3 Halst. R. 50.

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THE CHANCELLOR. The bill is filed to enforce the specific performance of a contract for the sale of certain real estate made by the complainant, as administrator with the will annexed, and trustee of the estate of Catharine C. Young, deceased, to the defendant. The sale was made on the twenty-second of September, 1860. By the conditions of sale the deed was to have been delivered on the first Monday of December following. The defendant declined to accept the deed, and now resists a decree for specific performance on the ground of defective title.

Catharine C. Young, the complainant's testatrix, claimed title to the premises under a deed made by commissioners appointed by the Court of Common Pleas of the county of Bergen, upon an application for the partition of certain real estate whereof Thomas Stevenson died seized, among his devisees, under the act of 1789. Three of the tenants in common held their shares in fee. Two of them were tenants for life only, with remainder over to their children. The proceedings were in the name of those only having estates in possession. The tenants in remainder were not, and could not, be made parties to the proceeding.

In *Sterens v. Enders*, 1 *Green* 271, it was decided by the Supreme Court of this state, that on application for partition, where there were persons owning estates in remainder who could not be made parties to the suit, the court have no authority, under the act of 1789, to make an order for sale, or to approve and confirm it. This case falls directly within the authority of that adjudication, and it is admitted that if that decision be law, the sale in this case was unauthorized and illegal. But it is insisted that the decision in that case is not law. If any doubt ever existed in regard to the propriety of that decision, it ought not to be questioned at this time and in this cause. It was the recognized law of the state for nearly thirty years. It was the unanimous judgment of the court, and has never before, so far as I am aware, been drawn in question. Its operation has been terminated by express legislation. A court of equity ought

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not to enforce the specific performance of a contract for the purchase of lands under a sale which the Supreme Court had pronounced unauthorized and illegal.

It is further insisted that if the decision in *Stevens v. Enders* is recognized as law, and if the sale was unauthorized and illegal, yet the order confirming the sale, having been made by a court of general jurisdiction upon a subject matter within its jurisdiction, is final and conclusive and can never be questioned in a collateral suit.

The soundness of this general proposition cannot be questioned. It has been established by the uniform current of authority both in the Supreme Court of the United States and of this state. *Kemp's Lessee v. Kennedy*, 5 Cranch 173; *Ex parte Watkins*, 3 Peters 193; *Voorhees v. Bank of U. S.*, 10 Peters 449, 472; *Hartshorne v. Johnson*, 2 Halst. 108; *Den v. O'Hanlon*, 1 Zab. 582; *Den v. Gaston*, 4 Zab. 818, 820; *Stokes v. Middleton*, 4 Dutcher, 32, 35; *Pittenger's Adm'r v. Pittenger*, 2 Green's Ch. R. 156.

It is urged that the present case falls directly within the operation of this principle, inasmuch as the court had jurisdiction of the matter of partition. And it is admitted by the Chief Justice in *Stevens v. Enders*, that a partition might be made as between the tenants in fee and tenants for life who had present interests in the land. But the fallacy of the argument consists in this, that, although the court had jurisdiction over the partition, they had none over the sale. If they had power to direct a partition, they had no power to order a sale, or to affect the interests of the persons having estates in remainder. The order for sale was not an error of judgment, but an usurpation of power. The order of the court was therefore not conclusive upon the validity of the sale, which may be drawn in question in a collateral proceeding.

But if, in point of fact, the court had jurisdiction, and its judgment cannot collaterally be drawn in question, it may still remain a matter of doubt whether a court of equity would have enforced the contract as against a purchaser, as

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the law stood at the date of this contract. It was held by the Supreme Court in *Stevens v. Enders*, that a *certiorari* for the removal of proceedings upon an application for partition and order for sale, is not within the provision of the statute which prohibits the allowance of a *certiorari* after the lapse of eighteen months from the date of the order. Its allowance in such case rests in the sound discretion of the court. And where the rights of a married woman or of infant children are involved, what limit would a court of law set to the exercise of that discretion? It might not be safe to assume that any time short of the actual removal of the legal disability would constitute that limit. Nor would a court of equity, in the exercise of its discretion, compel a purchaser to accept a title depending upon an illegal and invalid sale, while it remained open to review at the discretion of a court of law, although the judgment unreversed might be conclusive upon the party's rights.

The act of the fourteenth of March, 1861, operated to heal the defects in the title under the commissioners' sale. On the fifteenth of June thereafter, a conveyance was again tendered to the defendant, which he refused to accept. Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. Specific performance is therefore frequent decreed, where the terms for the completion of the contract have not, in point of time, been strictly complied with.

Story's Eq. Jur., § 776; *Fry on Spec. Perf.* 314.

But in this case, between the time fixed for the delivery of the conveyance in December, 1860, and the subsequent tender of the deed after the title had been perfected, circumstances had materially changed. A civil war had broken out, and the value of real estate was depressed. It could not be consistent with the real intention of the parties, or with the real justice of the case, to compel the vendee, under such circumstances acting in good faith, to accept a deed against his will, which he was ready and willing to accept.

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at the time fixed for performance. I do not indeed understand the counsel of the complainant to place his case at all upon this ground, but to rest exclusively on the position that the act of the fourteenth of March, 1861, was but an affirmation of the law as it previously stood, and that the title was consequently perfect at the time of the tender of the deed.

Failing in this position, he is not entitled to relief. The bill must be dismissed with costs.

CHARLES P. STRATTON, Receiver of "The Camden Iron Manufacturing Company," vs. HENRY ALLEN.

1. Objections relating to the *regularity* of a judgment at law, or to the validity of the *instrument* upon which it is founded, constitute no ground for the interference of equity.
2. If the instrument upon which the judgment was entered, was without consideration or invalid, or if the judgment was unauthorized or illegal, the remedy for a party aggrieved is by application to the court in which it was entered, or by writ of error.
3. A judgment can only be impeached in a court of equity for fraud in its concoction, and not for fraud in the instrument upon which it is founded.
4. A member or director of a corporation may make contracts with it, like any other individual, and when the contract is made, the director stands, as to the contract, in the relation of a stranger to the corporation.
5. Corporations that have the power to borrow money, have also the necessary power, as well as the legal right, to give obligations for its repayment in any form not expressly forbidden by law. The fact that the security was given, and the judgment confessed to a director, cannot destroy its validity.
6. A judgment confessed by a party on the eve of insolvency, without any view or expectation of obtaining aid to enable him to continue his business, affords strong evidence that it was done in contemplation of insolvency, and with the view of preferring creditors.
7. In the distribution of the funds of an insolvent company, a judgment

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confessed in contemplation of insolvency and with the view of preferring creditors, is entitled to no priority. The debt will be paid *proportionably* with the other debts of the company.

Wilson and Carpenter, for complainant.

Dayton and Browning, for defendant.

Cases cited by complainant's counsel. *Rawnsley v. Trenton Mut. Life and Fire Ins. Co.*, 1 Stockt. 347; *Holcomb & Ex'r's v. Bridge Co.*, *Ibid.* 457; 2 Green's Ch. R. 266; *Nix. Dig.* 371, § 2; *Angell & Ames on Corp.*, § 600; *Wood v. Dummer*, 3 Mason 308; *Lewin on Trusts* 460-61; *Ex parte James*, 8 Vesey 348; *Cumberland Coal and Iron Co. v. Sherman*, 8 Law Reg. 333, (April, 1860).

Cases cited by defendant's counsel. *Wiggins v. Armstrong*, 2 Johns. Ch. R. 144; *Wintringham v. Wintringham*, 20 Johns. R. 296; *Brinkerhoff v. Brown*, 4 Johns. Ch. R. 671; *Williams v. Brown*, *Ibid.* 682; *McDermutt v. Strong*, *Ibid.* 687; *Cooper's Eq. Pl.* 149; *Mitford's Eq. Pl.* 115; *Hunt v. Field*, 1 Stockt. 36; *Williams v. Michenor*, 3 *Ibid.* 524; 2 Story's Eq. Jur., § 1575; 3 Johns. Ch. R. 275; 4 *Ibid.* 85; 5 *Ibid.* 555; 6 *Ibid.* 235; 20 Johns. R. 668; *Hoyt v. Hoyt*, 1 Harr. 138; *Angell & Ames on Corp.*, § 233; *Rogers v. The Danby Universalist Society*, 19 Vt. 191; *Sawyer v. The M. E. Soc.*, 18 Vt. 409; 6 Vt. 76.

THE CHANCELLOR. On the eleventh of April, 1860, "The Camden Iron Manufacturing Company" executed, under their corporate seal and the signature of their president, to Henry Allen, then being a director of said company, two bonds, with warrants of attorney to confess judgments thereon: one for \$2399.75, payable on the day of its date, the other for \$10,000, payable in five days thereafter. Judgment in the Camden Circuit Court was entered upon the one bond on the fourteenth of April, and upon the other on the fifth

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of August, 1860. On the twenty-fifth of September, 1860, a bill was filed to have the corporation declared insolvent, and on the twentieth of October, a receiver was appointed. The assets are insufficient to satisfy the debts of the company. This bill is filed by the receiver to set aside the judgments in favor of Allen, as fraudulent and void, or to establish the right of the other creditors to share ratably in the distribution of the funds. The principal objections urged against the validity of the judgments, are—

1. That the affidavit upon which the judgments were entered, was insufficient.
2. That the board of directors, by whom the order was made for the execution of the bonds and warrants, was not duly organized; a quorum not being present.
3. That Allen, as a director, could not legally vote in favor of an order to execute the bonds to himself.
4. That the order of the directors authorizes the execution of a bond only, and confers no authority to execute a warrant of attorney.
5. That the bonds and warrants are not countersigned by the secretary, as required by the by-laws of the company.
6. That the judgments are fraudulent as against creditors, because they were given to a director of the company, whereby he obtains wrongfully a preference over other creditors equally meritorious.
7. That the judgments were confessed to Allen when the company was insolvent, or in contemplation of insolvency, for the purpose of giving him preference over other creditors.

So far as these objections relate to the regularity of the judgments, or to the validity of the instruments upon which they are founded, they constitute no ground for the interference of this court. The defendant is in possession of the judgments of a court of common law, having jurisdiction of the subject matter. If the instruments upon which those judgments were entered, were without consideration or invalid, or if the judgments themselves are unauthorized or illegal, the remedy for a party aggrieved would be by ap-

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plication to the court in which the judgment is entered, or by writ of error. They are questions exclusively for the cognizance of those courts. It seems to be conclusively settled that a judgment can only be impeached in a court of equity for fraud in its concoction. *2 Story's Eq.*, § 1575; *Shottenkirk v. Wheeler*, 3 Johns. Ch. R. 275; *DeRiemer v. DeCantillon*, 4 *Ibid.* 85; *French v. Shotwell*, 6 *Ibid.* 235.

Whether the judgments are irregular or erroneous, are exclusively questions of law. So long as they remain in force, they must be received in this court as valid. It was suggested upon the argument, that this court would at least give to the complainant an opportunity of having these questions tested at law. This course the complainant may adopt of his own volition, without the assent or direction of equity. And if the judgments are opened or reversed at law, he will not require the further aid or direction of this court.

The only ground upon which equity can interfere by avoiding the judgments is, that the judgments are fraudulent as against the creditors of the corporation.

The alleged ground of fraud is, that the company being insolvent, the judgments were confessed to a director of the company for the purpose of giving him preference over other creditors having equally meritorious claims.

In considering this question, it will be assumed that the entire sum for which the judgments were confessed, was due from the corporation, and that there was no actual fraud in the transaction.

The mere fact that the creditor was a director of the company, does not render the transaction fraudulent. There is nothing which forbids either the members or directors of a corporation to make contracts with it, like any other individual; and when the contract is made, the director stands, as to the contract, in the relation of a stranger to the corporation. *The Pres't, M. & Co. of the B. & D. Turnpike Road v. Myers*, 6 Serg. & R. 12; *Gordon v. Preston*, 1 Watts 385; *Central Railroad v. Claghorn*, 1 Speer's Eq. R. 545; *Angell & Ames on Corp.*, § 233.

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And corporations that have the power to borrow money, have also the necessary power, as well as the legal right, to give obligations for its repayment, in any form not expressly forbidden by law. *Curtis v. Leavitt*, 1 *Smith* 9.

The mere fact, therefore, that the security was given and the judgments confessed to a director, cannot destroy its validity. Nor can it be denied that a corporation, as well as an individual, may, independently of the statute, confess judgments in order to prefer creditors.

The objection results from the provisions of the statute. It is obvious that the policy of the statute for the prevention of frauds by incorporated companies, *Nix. Dig.* 371, is to preserve the entire property of an insolvent debtor for equal distribution among all its creditors. It declares all transfers of property made after insolvency, or in contemplation of insolvency, null and void as against creditors. It requires that in the payment of creditors and distribution of the funds of an insolvent corporation, the creditors shall be paid in proportion to the amount of their respective debts, excepting mortgage and judgment creditors, *when the judgment has not been by confession for the purpose of preferring creditors.* Its obvious requirement is, that where the judgment is confessed for the purpose of preferring creditors, the claim shall have no priority over other debts.

There is little controversy as to the facts of the case. The bill charges that at the time the bonds and warrants were executed, the company was insolvent, or on the eve of becoming so; and that its condition was well known to the officers of the company, and particularly to Allen, who was a director and the secretary of the company; and that the bonds and warrants were executed with the view of giving Allen a preference over other creditors. The answer does not deny that the company was insolvent, nor the defendant's knowledge of that fact, nor that the judgments were confessed for the purpose of giving him a preference over other creditors. The answer alleges that the defendant made loans and advances to the company, not knowing or

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believing that they were on the eve of bankruptcy. But the advances and liabilities for which the judgments were confessed, were made and assumed long before the confession of the judgments, or the giving of the bonds and warrants. Not a dollar was advanced, nor a liability assumed at the time. Previous to that time he had made large advances to enable the company to carry on its operations, but no advances whatever appear to have been subsequently made. From Allen's position as director and secretary of the company, he must have been fully acquainted with its financial condition and operations. The testimony of the president shows that at the time the securities to Allen were authorized, he believed that the Price mortgage would be foreclosed, and in that event the company could not continue its operations without further aid from Allen. The foreclosure was commenced, and no further aid was furnished by Allen. The company, in fact, suspended its business about the first of July. It is apparent that the officers of the company acted from no hope or belief that they could carry on its business, or redeem it from insolvency. They expected to stop payment, and the security to Allen was given in anticipation of that event. The confession of the judgments could only embarrass their operations, without aiding them. They obtained by it no aid in continuing their business. No additional funds were procured, no extension of credit obtained. A judgment confessed under such circumstances affords the strongest evidence that it was done in contemplation of insolvency, and with the view of preferring creditors. *Everett v. Stone*, 3 Story 453; *Arnold v. Maynard*, 2 Story 354; *Curtis v. Leavitt*, 1 Smith 111; *Freeman v. Deming*, 3 Sandf. Ch. R. 332.

I think the facts are satisfactorily established, that at the time of the execution of the bonds and warrants, upon which the judgments are confessed, the company was insolvent, or on the eve of insolvency; that its financial condition was well known to Allen, who was a director and the secretary of the company; and that the judgments were confessed in

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contemplation of insolvency, for the purpose of preferring Allen over other creditors. The simple question is, whether, in payment of the creditors and in the distribution of the funds of the company, the judgment thus confessed is entitled to priority in payment over other claims against the company, or whether the debts are all to be paid proportionably. The statute does not declare the judgment void. It is not within the prohibition of the second section, and the fifteenth section simply regulates the distribution of the funds, and the mode in which the debts shall be satisfied. The resolution, under which the bonds and warrants were given, does not authorize the confession of a judgment, or the execution of a warrant for that purpose. It directs that the sum of \$10,000 shall be secured by *bond and mortgage*, and authorizes the president to prepare an inventory of the tools and fixtures, to be given with the mortgage. If such security had been given by the company when insolvent, or in contemplation of insolvency, it seems clear that the mortgage would, under the provisions of the second section of the act, have been void as against creditors. It seems equally clear, under the provision of the ninth section of the act, that a judgment confessed under like circumstances can be entitled to no priority over other claims in the distribution of the funds. It is difficult to imagine what operation can be given to the ninth section of the act, if it cannot be applied for the protection of creditors in a case like the present, where the evidence of the insolvency of the company, and the purpose of confessing the judgment, is so strong, and where the creditor, in whose favor the judgment is confessed, is an officer of the corporation, fully acquainted with its financial condition. It was earnestly insisted upon the argument, that Allen, being a director of the company, and in case of its insolvency, a trustee of the property for the benefit of its creditors, was disabled in equity from acquiring priority over other creditors by taking a judgment in his own favor. That his conduct in taking the judgment was not only in violation of the policy of the statute, but was an abuse of his

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official character as trustee, which rendered the judgment in his favor, fraudulent and void as against creditors. I deem it unnecessary to express any opinion upon this point. It is clear from the evidence, that the debt for which the judgment is confessed, was honestly due, and the ends of justice will be fully answered by declaring that in the distribution of the funds of the corporation, the judgment shall be paid proportionably with the other debts. Nothing could be gained by declaring the judgment void, and compelling the defendant to prove his claim before the receiver.

ELZA ANN FREY vs. GARRET I. DEMAREST and others.

1. A bill in equity by the next of kin, for the distributive share of an estate in the hands of an administrator, will be sustained, where no decree for distribution has been made.
 - 2. The statutory remedy by suit at law for the recovery of a legacy or a distributive share of an estate is *cumulative*, and was not designed to limit or qualify the ancient jurisdiction of the court of equity over the subject.
 3. The Court of Chancery is not deprived of its original jurisdiction in any case, either by the operation of a statute conferring similar jurisdiction upon the common law courts, or by the adoption in those courts of the principles or practice of courts of equity.
 4. The court of equity has concurrent jurisdiction with the Prerogative Court over the administration of the assets of deceased persons.
 5. Unless for some special cause, a court of equity will not interfere with the ordinary jurisdiction of the Orphans Court in the settlement of the accounts of executors or administrators. Nor will it attempt to look behind such settlement, unless on the ground of fraud or mistake.
 6. The retention by an administrator of the fund in his hands, mingled with his own funds and used for his own profit, will entitle the party beneficially interested in the fund to a discovery and an account, and to such decree as may be necessary to maintain and enforce the complainant's rights.
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C. H. Voorhis, for Demarest, in support of the demurrer.

Slaight, for complainant, contra.

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THE CHANCELLOR. The bill charges that Henry Frey died intestate, on the twenty-eighth of June, 1839, seized and possessed of considerable personal and real estate. On the seventeenth of September, 1839, letters of administration were granted to the defendants, who converted the personal property into cash and sold the real estate, by order of the Orphans Court, for the payment of debts. On the twenty-fourth of September, 1840, Demarest, one of the administrators, presented his separate account of the personal, and of the proceeds of the sale of the real estate, to the Orphans Court for settlement. The account was allowed and settled, leaving in his hands at that time a balance of \$280.37, to which the complainant claims title. The complainant came of age in December, 1859, having been, on the death of her father, an infant about six months old. The defendant, Demarest, at the time of the settlement of his account, was aware of the complainant's rights, but has never paid over the balance in his hands, nor any part of it, but has mingled it with his own funds, and has used and applied it in his business for his own benefit, for more than twenty-one years last past, and so continues to use it, and has refused and still refuses to account to the complainant. The bill prays an account, and a decree for the balance of the estate in the hands of the defendants, with interest.

To this bill, Demarest, one of the defendants, demurs. The only question presented by the demurrer is, whether the bill contains any equity. The demurrer is general, and is directed to the whole bill. No objection, therefore, to the form or structure of the bill, or to defective averments therein, if such there be, or to a defect of equity in particular parts of the bill, can avail the defendant. *Story's Eq. Pl.*, § 442, § 443, § 453, § 528.

It appears by the bill that the account of one of the administrators was settled in the Orphans Court, and that there has been no decree for distribution. It is urged in support of the demurrer, that a bill in equity cannot be sustained by the next of kin for the recovery of the funds in the

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hands of the administrator, prior to a decree for distribution. Such is undoubtedly the rule at law. *Ordinary v. The Ex'rs of Smith*, 3 Green's R. 92, 97.

The remedy by suit at law, for the recovery of a legacy or a distributive share of an estate, is of statutory origin and is regulated by the provisions of the statute. The statute requires, in order to the maintaining of a suit at law, not only that there should be a decree for distribution, but that a refunding bond should be tendered. *Nix. Dig.* 278, § 12; 279, § 17; 281, § 28.

This statutory remedy is of comparatively recent origin. It was intended for the ease and favor of persons entitled to distributive shares. It furnishes a cumulative remedy, and was not designed to limit or qualify the ancient jurisdiction of the court of equity over the subject.

Such was the view of Chancellor Kent in regard to a similar statute in the state of New York. *Decouche v. Saretier*, 3 Johns. Ch. R. 222; *Seymour v. Seymour*, 4 Ibid. 409.

And such, so far as I am aware, has been the view uniformly taken of our own statute.

The Court of Chancery is not deprived of its original jurisdiction in any case, either by the operation of a statute conferring similar jurisdiction upon the common law courts, or by the adoption in those courts, of the principles or practice of courts of equity. *Atkinson v. Leonard*, 3 Bro. C. R. 218; *King v. Baldwin*, 17 Johns. R. 384; *Sailly v. Elmore*, 2 Paige 497; *Varet v. New York Ins. Co.*, 7 Paige 560; *White v. Meday*, 2 Edw. Ch. R. 486.

The concurrent jurisdiction of the court of equity with the Prerogative Courts over the administration of the assets of deceased persons, has been long and well settled. The jurisdiction is constantly exercised in behalf of legatees and next of kin for the recovery of their shares of the estate, as well as on behalf of creditors and executors or administrators. 1 Story's Eq. Jur., § 532, § 541-2.

The remedy of the next of kin for the recovery of a distributive share by bill in equity, was established as early as

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the reign of Charles II. *Gibbons v. Dawley*, 2 *Chan. Cas.* 198; *Pamplin v. Green*, *Ibid.* 95; *Matthews v. Newley*, 1 *Vern.* 133; *Howard v. Howard*, *Ibid.* 134.

In this state the jurisdiction of the court of equity over the accounts of executors and administrators, and to enforce the claims of creditors, legatees, and next of kin, has been repeatedly affirmed, and is constantly exercised. The jurisdiction itself, as well as the limitations of its exercise, are well settled. Manuscript opinions of Chancellor Williamson in *Garrabrant v. Lawrence*, and in *Burtis et al. v. Adm'rs of Hopkins*; *Meeker v. Marsh*, *Saxton* 198; *King v. Ex'r's of Berry*, 2 *Green's Ch. R.* 44, 261; *Salter v. Williamson*, 1 *Green's Ch. R.* 480, 489; *Smith v. Moore's Ex'r*, 3 *Green's Ch. R.* 485; *Vanmater v. Sickler*, 1 *Stockt.* 483; *Clarke v. Johnson*, 2 *Stockt.* 287.

The cases show that a bill in equity may be filed for the recovery of a legacy or distributive share, either before or after a settlement in the Orphans Court. Unless for some special cause, a court of equity will not interfere with the ordinary jurisdiction of the Orphans Court in the settlement of the accounts of executors or administrators. Nor will it attempt to look behind such settlement, unless on the ground of fraud or mistake.

There is nothing in the complainant's bill to justify any interference with the settlement made by the administrator in the Orphans Court. But she is entitled to an account of the balance found to be in the hands of the administrator upon that settlement, with interest thereon, or with the accumulation thereof in the hands of the administrator. The great length of time that the fund has been in the hands of the administrator, not, as the bill alleges and as the demurrer admits, invested for the benefit of the complainant, but mingled with his own funds by the administrator, and used for his own profit, entitles the complainant to a discovery and an account from the defendant, and to the aid of this court in the maintenance of her rights.

The demurrer is overruled with costs.

Smith v. Duncan.

DANIEL SMITH vs. GEORGE DUNCAN.

1. Gross inadequacy of price in the absence of fraud, mistake, illegality, or surprise, is not sufficient to set aside a sheriff's sale and conveyance under an execution at law.

2. A court of equity will not afford relief where the complainant has been guilty of *gross laches*, or where the injury was caused by his own *inexcusable negligence* and *inattention* to his interests.

3. A sheriff's sale and conveyance will not be set aside where the property has been resold to a third party for a valuable consideration, without notice of the complainant's equity. Where the equities are equal, the court will not interfere with the party holding the legal title, either for discovery or relief.

On final hearing.

I. W. Scudder, for complainant.

Winfield, for defendant.

Cases cited by complainant's counsel. *Stockton v. Ford*, 11 *How.* 247; *Harden v. Patterson*, 5 *Johns. Ch. R.* 48; *Leisenring v. Black*, 5 *Watts* 303; *Galbraith v. Elder*, 5 *Ibid.* 81; *Hockenbury v. Carlisle*, 5 *Watts & Serg.* 348; *Clearinger v. Reimar*, 3 *Ibid.* 486; *Henry v. Rainman*, 25 *Penn.* 354; *Surget v. Byers*, 1 *Hempstead C. C. R.* 715; *Ford v. Harrington*, 16 *N. Y.* 285; *Adams' Eq.* 184; *Benedict v. Smith*, 10 *Paige* 126; *Howell v. Baker*, 4 *Johns. Ch. R.* 118; 2 *Sugden on Vendors* 552, 560, § 48, 66, (ed. 1851); 1 *Story's Eq. Jur.*, § 400; *Penn v. Craig*, 1 *Green's R.* 495.

Cases cited by defendant's counsel. *Hawley v. Cramer*, 4 *Cowen* 740; *McCollum v. Hubbert*, 13 *Ala.* 289; *Fox v. Mackreth*, 2 *Bro. Ch. R.* 400; *Hamilton v. Shrewsbury*, 4 *Rand.* 427; *Tripp v. Cook*, 26 *Wend.* 159; *Campbell v. Gardner*, 3 *Stockt.* 429; *Frakes v. Brown*, 2 *Blackf.* 295; *Spencer v. Champion*, 13 *Conn.* 11; *Neilson v. Neilson*, 5

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~~Baz~~-b. 568; *Champenois v. White*, 1 Wend. 92; *Evans v. Poz*-ker, 20 *Ibid.* 623; *Porter v. Boone*, 1 *Watts & Serg.* 251; ~~An~~-er. *Ins. Co. v. Oakley*, 9 *Paige* 263; *Mohawk Bank v. Atz*-ater

~~Atz~~-ater, 2 *Paige* 54; *Williamson v. Dale*, 3 *Johns. Ch. R.* 292; *Livingston v. Byrne*, 11 *Johns. R.* 555, 620; *Outcalt v. Disborough*, 2 *Green's Ch. R.* 214; *Skillman v. Holcomb*, 1 *Beas.* 131; *Clark v. Underwood*, 17 *Barb.* 222.

THE CHANCELLOR. The bill is filed by the defendant in an execution at law, to set aside a sheriff's sale of real estate, made under the execution. The evidence leaves no room for doubt that the complainant's interests were prejudiced by the sale. The property was struck off for \$25, and was sold immediately afterwards for \$1500.

But there are insuperable difficulties in the way of the complainant's title to relief.

1. There is no evidence of fraud or unfairness in the conduct of the sale. It was duly advertised, in compliance with the requirements of the statute. The complainant, moreover, had actual notice of the time and place of sale. The sheriff testifies that he gave him personal notice of the time and place at which the property was originally advertised for sale. He did not then attend, and the sale was adjourned. He was notified of the time and place to which the sale was adjourned, and failing to attend, the property was then struck off. There is no evidence that the complainant was prevented from attending the sale by accident or mistake. Nor is the allegation of surprise sustained by the evidence. The allegation of the bill is, that the complainant relied upon a third party to attend the sale on his behalf, and that the person so relied upon was absent from the state at the time of the sale. But the evidence does not show that his absence was a surprise to the complainant, or that he was not fully aware that he was not present at the time of the adjournment. The person, upon whom the complainant professes to have relied, was not called as a witness

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and the fair presumption is that there was no good ground for relying upon his attendance. The evidence presented shows the case of inexcusable negligence and inattention to his interest on the part of the complainant. Against such gross lack of care it is not the province of a court of equity to relieve.

2. Relief is sought, not against the purchaser at sheriff's sale, but against his alienee. The defendant claims to be a *bona fide* purchaser for valuable consideration. The evidence shows that he paid the full amount of the purchase money. One thousand dollars was paid before he received actual notice of the complainant's claim. He is sought to be charged with constructive notice of the circumstances of the sale, which form the basis of the complainant's claim to relief. Admitting that the circumstances of the sheriff's sale were such as to entitle the complainant to relief as against the purchaser under him, the evidence is not sufficient to designate the defendant's claim to the character of a *bona fide* purchaser for a valuable consideration, without notice of the complainant's equity. His equity is at least equal to that of the complainant, and he has the legal title. Under such circumstances, equity will not interfere, either for discovery or relief. 1 *Story's Eq. Jur.*, § 64, c.

The attorney of the plaintiff became the purchaser at sheriff's sale. Under the circumstances of the case he would have done in accordance with a familiar principle of equity, have been regarded as a trustee for the benefit of his client. *Holland v. Baker*, 4 *Johns Ch. R.* 118; *Adams' Eq.* 184.

But the plaintiff in execution is not seeking redress, but it is perceived how this principle can be invoked in favor of the defendant. He has no claim for equitable relief against the plaintiff in execution. Nor does the case fall within the principle adopted and applied in *Stockton v. Ford*, 11 *Hard* 247.

The fact that a part of the purchase money was paid before notice of the complainant's equity, cannot operate to render the conveyance to the defendant fraudulent. Its ultimate

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effect would be, in case the sale was set aside, to deprive the plaintiff of an equitable claim to a return of that portion of the purchase money.

The bill is dismissed, without costs.

JOSEPH C. JORDAN and wife and others *vs.* ANDREW J. CLARK
and others.

1. As a general rule, where the will is silent as to interest, a legacy bears interest only from the time it is made payable. But where a legacy to a child of the testator is made payable at a future day, and no maintenance in the meantime is provided for the legatee, the legacy bears interest from the death of the testator.

2. Where the testator has expressly provided maintenance up to a certain period, leaving a chasm between that period and the time of the payment of the legacy unprovided for, interest will be allowed upon the legacy during such interval, by way of maintenance.

3. Where the devisee of land charged with the payment of legacies, has furnished the legatees with support, though not in strict conformity with the requirements of the will, and such support was furnished and accepted as a substitute for the provision directed by the will, and was in fact more advantageous to the legatees than the interest on the legacies would have been, the period, during which such support was furnished, will be deducted from the time during which interest is allowed on the legacy.

4. Where a testator, by his will, provides that his minor children shall receive their maintenance upon his homestead farm, so long as the devisees and their mother agree to continue upon it and support them there, if the children, without the consent of their mother and the devisees, leave the farm during the period for which the testator provided for their maintenance there, they can claim it in no other form; but otherwise, if they leave by constraint, and not from choice.

5. Upon a bill filed to recover the interest of a legacy only, a decree cannot be made for the payment of the principal which has fallen due since the filing of the bill.

6. Such decree is not within the special prayer for relief, and could not have been prayed for at the time of filing the bill. If relief is asked to which the complainant is not entitled, the bill is demurrable.

7. Under the general prayer for relief, the relief granted must be agreeable to the case made by the bill, and such as the case stated will justify.

8. In a foreclosure suit if the mortgage is forfeited, and the complainant

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entitled to a decree of foreclosure at the time of the commencement suit, a decree for the whole amount due upon the mortgage, which becomes due before or after the filing of the bill, is strictly within the prayer for relief, and such as the case stated will justify.

Hannah and P. L. Voorhees, for complainants.

S. H. Grey, for defendants.

THE CHANCELLOR. The bill was filed by and on behalf of the infant children and legatees of Joel G. Clark, deceased, to recover the interest on certain legacies bequeathed by their father, or a provision for their support and maintenance. The legacies are charged upon the real estate devised to the defendants. The question raised by the plaintiff is, whether, under the provisions of the will, the legatees are entitled to recover anything beyond the principal legacies.

The testator bequeathed to each of the complainants three daughters, Mary, Emeline, and Martha Jane, \$1000 to be paid to her at the age of twenty-one years, and his homestead farm with the same. He devised his homestead farm in equal portions to his three sons, A. Joel, and James, in fee, subject to the legacies in his will. He also bequeathed to his said sons, the devisees of the homestead, his stock, farming utensils, household goods, kitchen furniture, upon condition of their continuing to cultivate the homestead farm, and farming and cultivating the same to the best advantage and interest of the whole family; otherwise to be sold for the benefit of his children in equal proportion.

By the eleventh item of his will, the testator requires his wife and his said three sons shall continue on his homestead farm, and cultivating the same to the best advantage and interest of the whole family; and in case of refusal or neglect of any of them to farm the same, he directs that the farm be rented until his youngest son, James, becomes twenty-one years of age, and the net proceeds appropriated to the support of the family.

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clothing, and maintaining his children equally. And in case of his wife and sons not agreeing to continue on the farm as requested, the testator further directs that his stock, farming utensils, household goods and kitchen furniture, shall be sold and applied to the schooling, clothing, and maintenance of his children equally.

At the time of his death, James, one of the sons, and the three daughters, were minors. James came of age on the fifth of March, 1852. Until this period the family continued together on the farm, as requested by the testator, and the complainants were there supported as provided for in the will. At this period the farm was partitioned between the three devisees.

The provisions of the will are somewhat conflicting, and the intention of the testator, as to the provision for the support of his minor children, after James came of age, not entirely free from doubt. If it was intended that the family should continue together upon the farm until the youngest child became of age, then the complainants were clearly entitled, upon the division of the farm by the defendants, to have the value of the stock, farming utensils, and household and kitchen furniture, applied to their support and education during their minority. If, on the other hand, it was intended that this provision should continue only till James came of age, as the defendants insist it was, then no provision whatever is made for the support of the complainants after that time, during their minority. Assuming the latter to be the true construction of the will, the complainants are entitled to recover interest on their legacies.

As a general rule, where the will is silent as to interest, a legacy bears interest only from the time it is made payable. But where a legacy to a child of the testator is made payable at a future day, and no maintenance in the meantime is provided by the testator for the legatee, the legacy bears interest from the death of the testator. *Brinkerhoff v. Ex'rs of Merselis*, 4 Zab. 680; *Cox v. Coykendall*, 2 Beas.

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138; *Mole v. Mole*, 1 *Dick.* 310; *Heath v. Perry*, 3 101; *Lupton v. Lupton*, 2 *Johns. Ch. R.* 628.

So where the testator has expressly provided maintenance up to a certain period, leaving a chasm between that period and the time of the payment of the legacy unprovided for, interest will be allowed upon the legacy during such interval, by way of maintenance. *Chambers v. Goldwin*, 11 V

The period during which the complainants remained with their brother James, after the farm was divided, must be deducted from the time during which interest is allowed on the legacy. Though the provision furnished for their support during this period was not in strict conformity with the requirements of the will, it was no doubt furnished and accepted as a substitute for the provision directed by the will, and was more advantageous to the legatees than the interest on the legacy would have been. The answer says that the maintenance and schooling of the complainants during the time when it was furnished pursuant to the directions of the will, cost from \$1 to \$1.50 per week, which is more than double the amount of the annual interest on each legacy.

The fact alleged in the answer, that the defendants paid the debts of the estate to an amount exceeding the value of the stock, farming utensils, and household kitchen furniture, ordered to be sold for the benefit of the complainants, can in no wise affect their claim for maintenance. The will charges the debts, so far as they shall remain unpaid, by the personal assets, upon the land devised to the defendants.

It was manifestly the desire of the testator that his minor children should receive their support and maintenance upon the farm, so long as the devisees and their mother agreed to continue upon the farm and to furnish the support thereto. Had the minor children, without the consent of their mother and brothers, left the farm during the continuance of the period for which the testator provided their maintenance upon the farm, they could have claimed it in no other form.

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But not only did the defendants fail to continue to occupy the farm in the mode desired by the testator, but it is apparent, from the evidence, that the complainants left the farm by constraint, rather than from any choice of their own.

The claim of Jordan and wife has been satisfied since the filing of the bill of complaint. It must be referred to a master to ascertain and report the amount due for interest upon the legacies of the other complainants from the twenty-fourth of December, 1855, giving credits for all payments made since that time, by either of the defendants, for the support of the complainants.

It appears by the evidence that the principal of the legacy to one of the complainants, has fallen due since the filing of the bill of complaint. But no relief can be decreed on that ground. A decree for the principal of the legacy is not within the special prayer for relief. No such relief could have been prayed for at the time of filing the bill. If a complainant asks for relief when he is not entitled to it, his bill would be demurrable. *Story's Eq. Pl.*, § 17, 43.

Nor can such decree be made under the general prayer for relief, for the relief granted must be agreeable to the case made by the bill, and such as the case stated will justify. *Story's Eq. Pl.*, § 40, 42.

In a foreclosure suit, the complainant, in practice, recovers instalments of principal as well as of interest, falling due after the commencement of the suit. If the mortgage is forfeited, and the complainant entitled to a decree of foreclosure at the time of the commencement of the suit, a decree for the whole amount due upon the mortgage, whether it became due before or after the commencement of the suit, is strictly within the prayer for relief, and such as the case stated will justify. It becomes simply a question of the amount due upon the mortgage at the date of the master's report. This practice affords no justification for a decree for the principal of the legacy in this cause, however clear the complainants right may be.

Ex'rs of Reed v. Reed.

EXECUTORS OF JOSEPH W. REED vs. WILLIAM REED.

1. Where the cause is heard upon bill and answer, the allegations of the answer are to be taken as true.
 2. A tenant for life is entitled to work a mine, quarry, clay-pit or sand-pit, which has been opened and used by the former owner. It is a mode of enjoyment of the land to which he is entitled.
 3. A bill asking an injunction to restrain waste, and also an account for rent due, is demurrable on the ground of multifariousness.
 4. When the title of *ceatui que trusts* to the fund in question is involved no decree will be made unless they are before the court.
 5. On final hearing, permission given to amend by consent, by adding necessary parties within ten days, and before signing the decree.
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Beasley, for complainants.

A. V. Schenck, for defendant.

THE CHANCELLOR. Joseph W. Reed, the complainant testator, by his will, devised to his executors a farm for the life of his brother, William Reed, the defendant, in trust that they would permit him to occupy and enjoy the same, upon payment to them, for the use of the testator's sisters, Elizabeth Johnson and Ann Herron, of the yearly rent of \$100 to be divided equally between them. On the death of William Reed, the defendant, the land is devised in fee to the children of the testator's said sisters, *viz.* to William R. Johnson and John H. Johnson, the children of Elizabeth Johnson, who are the complainants; and to the children of Ann Herron. The defendant, since the death of the testator, has been, and still is, in the possession of the farm by the permission of the complainants.

The bill charges that the defendant has committed waste on the premises, by cutting more timber and wood thereon than was necessary for the use of the farm, and by selling large quantities of sand, dug upon the land, to the prejudice of the inheritance; and that the defendant is also in arrear for

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rent, nearly \$200. The bill prays that the defendant may be decreed to make satisfaction for the waste committed; that he may be restrained from the commission of further waste; and that the complainants may have such further and other relief as may be agreeable to equity.

The answer denies the commission of waste by the cutting of timber; admits that the defendant has dug and sold sand from the ancient sand pits upon the premises, used for that purpose by the testator in his lifetime, and by other owners and tenants of the premises; alleges that the sand pits are upon a portion of the premises which can be used for no other purpose, and are unfit for cultivation; but claims that the defendant has a right to such use of the premises, and that it occasions no prejudice to the inheritance.

The answer further alleges that twenty acres of woodland, a part of said premises, had been sold by the executors by order of the Orphans Court, and that in consequence of such sale, and of the defendant's consent thereto, the complainants had agreed, with the consent of all parties interested, that the defendant should pay only \$80 per annum rent for the residue of the farm remaining unsold; that only one year's rent is in arrear and unpaid; and that, on the settlement of the executors' account, there remained in their hands of the proceeds of said sale, a balance of \$249.51, to the use and benefit of which the defendant claims to be entitled. The cause is brought to hearing upon bill and answer.

1. The answer denies the commission of waste by cutting timber on the premises, and thus effectually disposes of that part of the complaint. The allegations of the answer upon the present hearing are to be taken as true.

2. The tenant for life is entitled to work a mine, quarry, clay-pit, or sand-pit, which has been opened and used by the former owner. The working of the mine or quarry is a mode of enjoyment of the land to which the tenant for life is entitled. It is well settled, in regard to tenancies in dower, that the widow is entitled to dower in such mines

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and quarries as were actually opened and used during the lifetime of her husband. *Stoughten v. Leigh*, 1 *Taunt.* 402; *Billings v. Taylor*, 10 *Pick.* 460; *Coates v. Cheever*, 1 *Cowen* 460; *Rockwell v. Morgan*, 2 *Beas.* 389; *Park on Dower* 115, 119; 1 *Washburn on Real Prop.* 165.

The same principle applies to other estates for life. So far as relates to the commission of waste, the bill of complaint cannot be sustained.

3. The residue of the complaint relates to the claim for rent. The bill contains no prayer for an account of the rent, nor for a decree for payment. A reference to take an account of the rent due is now asked, under the general prayer for relief. It may well be questioned whether a bill asking for an injunction to restrain waste, and also an account for rent due, would not be liable to objection on the ground of multifariousness. The two grounds of suit are wholly distinct and unconnected, and each is sufficient as stated to sustain a bill. *Bedsore v. Monroe*, 5 *Ired. Eq. R.* 313; *Story's Eq. Pl.*, § 271, c.

But regarding this objection as waived by the answer, and as not liable to prejudice the rights of any of the parties, still I think the complainants are not entitled to an account. The proper parties are not before the court. The bill claims that the complainants are entitled to recover rent at the rate of \$100 per annum. The answer insists that the defendant, by virtue of an agreement made by the complainants, by and with the consent of all the parties interested, is liable, since the sale of a part of the land, to pay rent only at the rate of \$80 per annum. By the terms of the will, the tenant for life is to pay to the executors rent at the rate of \$100, which is to be divided by the executors equally between the two sisters of the testator. The *cestui que trusts* are not before the court. They would not be bound by any decree that might be made in the case. The defendant also claims, by his answer, an interest in the surplus of the proceeds of the sale of the land in the hands of the executor. Whatever view may be taken of the claim of the complainants, the

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parties interested in that fund are not made parties to the suit. As the case now stands upon the bill and answer, the necessary parties to the account are not before the court. I think, therefore, that the bill must be dismissed.

If the parties are desirous that the questions arising upon this part of the case should be settled, and an account taken under the direction of the court, the bill may be amended by consent, by adding the necessary parties within ten days and before signing the decree.

DANIEL M. SHIPMAN *vs.* JOHN COOK and others.

1. Though the delivery of a bill or note, either of the debtor or of a third party, is not payment of a pre-existing debt, but merely suspends the remedy, yet if the holder be guilty of laches, it operates as a complete satisfaction.

2. Where the note of a third party is endorsed by a mortgagor to the mortgagee, and is accepted by him as a *conditional* payment upon the bond, the mortgagor is entitled, as *endorser*, to a notice of protest or dishonor. If the holder of the note fail to give such notice, the mortgagor is discharged not only from liability as endorser, but also from liability *pro tanto* upon the bond.

3. If such note be accepted as absolute payment on the bond, and the payment of the note be guaranteed by the mortgagor, the guaranty will not restore the obligation. The mortgagor would be liable on his contract of guaranty, but his indebtedness upon the bond and mortgage would not be revived.

4. Gross laches and long delay on the part of the complainant in a simple foreclosure case, in commencing and prosecuting his suit, is unjust and oppressive to the defendant, and is a strong circumstance against the justice of the complainant's claim.

Vroom, for complainant, cited 4 *Johns. Ch. R.* 616; 9 *Vesey* 563.

Vanatta, for defendants, cited *Story on Prom. Notes*, § 117; *Wiseman v. Lyman*, 7 *Mass.* 286; *Tapley v. Martens*,

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8 T. R. 451; *Camidge v. Allenby*, 6 Barn. & Cr. Alderson v. *Langdale*, 3 Barn. & Ad. 660.

THE CHANCELLOR. The only question now to be is, whether the mortgage which the complainant foreclose, has been satisfied. The defendant claim credits upon the mortgage, which are disputed by plaintiff.

The first subject of controversy is a promissory note of John A. Kitchell, for \$80, payable to the order of defendant, and by him endorsed to the complainant. It bears date April first, 1833, and was endorsed to plaintiff before its maturity. The defendant testifies that the note was delivered in part payment of the debt. The complainant states that he understood that it was to be good on the bond, provided the note was paid. That the note never has been paid, is admitted. The complainant further testifies: "I endorsed it on the back of the note at the time he gave it to me; at the same time he put on the back of it." He identifies the endorsement to, which is as follows: "Received, twenty-fourth day of April, 1833, of John Cook, twenty-eight dollars, for one year's interest on this bond. \$28. Daniel M. Shipman, of J. A. Kitchell, which, when paid, will be in full payment of the note." The last clause of the endorsement is not on the signature, but bears unequivocal evidence of not being a part of the original endorsement, as it is written with a different pen and with different ink. It can add nothing to the weight of the parol evidence of the com-plainant. Why the endorsement relates to the interest only, to the entire amount of the note, is not satisfactorily explained. Both parties agree that the whole note was credited on the bond. In the absence of satisfactory proof as to the terms upon which the note was agreed to be paid, whether as an absolute or conditional payment must be had to the legal operation of the transfer.

Though the delivery of a bill or note, either of th-

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or of a third party, is not payment of a precedent debt, but merely suspends the remedy, yet if the holder be guilty of laches it operates as complete satisfaction. *Camidge v. Allenby*, 6 Barn. & Cress. 373; *Alderson v. Langdale*, 3 Barn. & Ad. 660; *Denniston v. Imbrie*, 3 Wash. C. C. R. 396; *Brower v. Jones*, 3 Johns. R. 230; *Byles on Bills* 303; *Story on Prom. Notes*, § 117.

No notice of protest or dishonor of the note was given to the defendant. To this, as endorser, he was unquestionably entitled. By this laches on the part of the holder the defendant was discharged, not only from liability as endorser, but from liability *pro tanto* upon the bond. By reason of the laches, the note operated as complete satisfaction of the indebtedness for which it was received. To this it is answered that the defendant occupies the position of a guarantor. Admitting the fact to be so, it is by no means clear that the laches of the holder was not such as to charge him with the loss. But the fact is not satisfactorily established that he was a guarantor. The defendant himself swears that the guaranty which now appears over his name, was not there when he endorsed the note. Another witness testifies that he heard the complainant say, after the maturity of the note, that he had been mistaken as to the party whose name was signed to the note, and that he feared the endorser would escape also. These witnesses testify as to a very ancient transaction, and standing alone it would be unsafe to rely upon their testimony. But it is remarkable that, although the complainant sued the maker of the note and failed to recover the debt for want of property, no claim was ever made against the defendant on the contract of guaranty, nor was a dollar of principal or interest paid on the mortgage debt for eleven years after the date of the alleged guaranty. Again: if the note was taken only as a conditional payment upon the mortgage debt, why should the complainant have asked from the mortgagor a guaranty of the note? If the note was dishonored, having been accepted only as a *conditional payment*, of what avail was the guaranty of the de-

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fendant? His personal liability for the debt remained as obligor upon the bond, as well as the security of the mortgage. There was no reason for asking a guaranty. It did not add a jot to the complainant's security. If that guaranty be in fact genuine, it affords the strongest corroboration of the defendant's evidence, that the note was accepted as payment upon the bond. If so, that ends the controversy. For if the note was accepted as absolute payment on the bond, it is clear that the guaranty will not restore the obligation. The defendant would be liable on his personal contract of guaranty, but his indebtedness upon the bond and mortgage would not be revived.

The defendant also claims allowance for the value of cattle hogs, corn, and spirits, delivered to the complainant as payment on said mortgage debt, between the years 1833 and 1837, and not credited on the bond. The delivery of most of the articles is clearly proven, to an amount sufficient to satisfy the mortgage. The complainant himself admits that they were delivered to, and received by him, as payments on account of the mortgage. But he insists that the value of the property was included in the money receipts endorsed upon the mortgage, duplicates of which were furnished to the defendant. The defendant, on the other hand, testifies that he received those receipts from the complainant; he saw them signed, and he paid the sums of money for which they were given. The receipts themselves are given for so much money paid. They contain no intimation that cattle, corn, or other chattels, constituted any part of the amount. I find no satisfactory evidence that the receipts are not what they purport to be—receipts for money paid.

The complainant's unsupported evidence cannot overcome the testimony of the defendant, corroborated by the plain language of the receipts. It appears moreover from the complainant's evidence, that he had an entry in his books, of the articles thus furnished by the defendant on account of the bond. That book the complainant was notified to pro-

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duce in evidence. He failed to do so, alleging that it was lost. What is still more significant, the defendant testifies that when called on for the payment of this debt, he saw in the hands of the person who was then the plaintiff's attorney, a list of the articles thus furnished. This list the attorney refused to deliver to the defendant, but he did exhibit the note, and told him that he (the attorney) would allow the articles, if the defendant would settle and pay the note. This testimony is so important in its bearing upon the cause, that the complainant was bound, in justice to himself and to the court, to have contradicted or explained it. Failing to do so, it must be taken most strongly against him. It is shown that although the attorney has ceased to act, and has removed from the state, he was in the state while the testimony was being taken. It is no excuse for the complainant to allege that the attorney left the state unexpectedly. If his evidence could not have been taken here, it might have been taken by commission at the place of his residence.

Another circumstance has impressed my mind unfavorably in regard to the justice of the complainant's demands. This difficulty originated thirty years ago. The complainant had it in his power at any time to have foreclosed the mortgage and have the controversy settled. He forbore to take this step until the defendant absolutely refused to make further payments upon the mortgage. The bill was at length filed on the fourteenth of January, 1849. No testimony was taken until ten years after the defendant's answer was on file, and then not until an order of the court was made requiring him to proceed. After the evidence was closed, the clause again slumbered until the complainant, on the motion of the defendant, was ordered to bring the cause to hearing, or have his bill dismissed. A simple case for foreclosure has thus been pending in the court, without an obstacle interposed by the defendant, for a period of over fourteen years. This is surely not the conduct of a party confident in the justice of his cause, and seeking the vindication of his rights.

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It is eminently unjust and oppressive to the defendant. There is no need of a reference to a master. If the credits are allowed, it is clear that the complainant's debt is satisfied.

The bill must be dismissed.

FERDINAND VAN DOREN vs. JAMES F. ROBINSON and others.

1. *Cestui que trusts* are not, it seems, necessary parties to suits against trustees, to compel the specific performance of contracts, except where some question arises touching the power of the trustees to execute the contract, or their authority to act under it.

2. But where a bill in equity involves the title of the *cestui que trusts* to the property in dispute, or where they are interested, not only in the fund or estate respecting which the question at issue has arisen, but also in that question itself, they are necessary parties.

3. An objection for want of proper parties taken at the hearing will not prevail, unless such parties are necessary to the final determination of the cause.

4. The general principle is, that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. But the principle does not apply where the contract, by its terms, gives to one party a right to the performance, which it does not give to the other.

5. Where the obligation to perform rests upon one of the parties only, equity will enforce the contract with great caution.

6. An agreement for the sale of land at a price *to be ascertained by the parties*, is too incomplete and uncertain to be carried into execution by a court of equity. But where the contract is, that land shall be conveyed "at a fair price," or "at a fair valuation," the court will direct the valuation to be made by a master, and will enforce the execution of the contract.

7. The true principle seems to be, that whenever the price to be paid can be ascertained in consistency with the terms of the contract, performance will be enforced. But the court will not make a contract for the parties, nor adopt a mode of ascertaining the price not in accordance with the spirit of the agreement.

8. A mere personal contract, not running with the land, nor binding the alienee at law, will be enforced against the alienee in equity, only where he is chargeable with notice of the contract.

9. Where the defendant claims title through a deed which contains the

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covenant sought to be enforced, he is chargeable with constructive notice of the covenant.

10. Notice of a deed is notice of its contents, and where a purchaser cannot make out a title but by a deed which leads him to another fact, he will be deemed to have knowledge of that fact.

11. Constructive notice is knowledge imputed or presumption, too strong to be rebutted, that the knowledge must have been communicated.

12. Where the covenantee in a contract for the conveyance of land, permits a purchaser to acquire title, take possession of the premises, and pay the purchase money without an intimation of his claim under the covenant, or of his willingness to accept the title, he has no claim to relief in equity.

13. Specific performance is relief which equity will not give, unless in cases where the parties seeking it, come as promptly as the nature of the case will permit.

Vanatta, for complainant.

Pitney, for J. F. Robinson.

T. Little, for the other defendants.

THE CHANCELLOR. The complainant, by deed bearing date on the eighth of April, 1843, conveyed to Phebe Woodward, a tract of land in the county of Somerset, containing about fifty acres. The deed is executed under the hand and seal, both of the grantor and grantee, and contains the following covenant on the part of the grantee: "Whenever she, the said Phebe Woodward, shall quit the actual occupation of the foregoing described land and premises, she will reconvey the same to the said Ferdinand Van Doren in fee simple, by a good and sufficient deed of warranty, free and clear of all encumbrances made or suffered by her, for a fair price, provided said Ferdinand Van Doren will accept such conveyance and pay such price; and in case the said Phebe Woodward shall die in possession of the said land and premises, she hereby further covenants with said Ferdinand Van Doren, that her heirs or assigns shall, upon her death, reconvey said land and premises to him by such deed, and

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upon such terms and conditions as last aforesaid, prov he or they will accept such deed, and pay such price for land and premises." The grantee entered into possessio the premises, and continued in the actual occupation i the spring of 1845, when she removed to the city of York, having leased the premises to a tenant for one y On the twenty-first of October, 1845, Phebe Woodward deed of bargain and sale, conveyed the premises in fe James F. Robinson, one of the defendants. On the fifte of February, 1847, James F. Robinson conveyed the prses in fee to John H. Robinson, who thereupon execut deed of trust in favor of his mother, Nancy Robinson whom the consideration money for the conveyance of farm by Phebe Woodward, was advanced. Both Phebe W ward, the complainant's grantee, and Nancy Robinsion whom the equitable estate in the premises was vested, in the year 1849. The complainant's bill was filed on seventeenth of April, 1862.

A preliminary objection is raised to the bill, for want proper parties. *Cestui que trusts* are not, it seems, according to the modern rule in England, necessary parties to : against trustees to compel the specific performance of tracts, except where some question arises touching the po of the trustees to execute the contract, or their authorit act under it. *Evans v. Jackson*, 8 Sim. 217; *Sande Richards*, 2 Collyer 568; *Fry on Spec. Perf.*, § 99.

But the bill in this case is not a mere bill for specific performance. It is also in the nature of a bill of interplea and involves the title of the *cestui que trusts* to the prop in dispute. It is in respect to that title, that the defend are called upon to interplead, and the court is asked to decide. The *cestui que trusts* are interested not only in fund or estate respecting which the question at issue arisen, but also in that question itself. In such case, *cestui que trusts* are necessary parties. *Calvert on Parti*

The devisees of the land in question under the wi Nancy Robinson, if that will should be established, as

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bill assumes that it may be, would have an interest in the event of the suit.

If, therefore, that question should be decided, it would become necessary to make the *cestui que trusts* parties, before the final determination of the cause.

But as the case will be disposed of upon other grounds, to tally irrespective of the title to the property, or the rights of the *cestui que trusts*, it cannot now with any propriety be declared that the bill is defective for want of parties. The objection was not raised by demurrer. An objection for want of proper parties taken at the hearing will not prevail, unless such parties are necessary to the final determination of the cause.

It is objected that the contract is not such as equity will enforce for want of mutuality. The general principle is, that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. *Fry on Spec. Perf.*, § 286.

But the principle does not apply where the contract, by its terms, gives to one party a right to the performance which it does not give to the other, as where a lease contains a covenant on the part of the lessor for a renewal of the lease at the expiration of the term. It is now settled that such covenant may be enforced against the lessor, though there is no reciprocal obligation on the part of the lessee to accept the renewal. *Fry on Spec. Perf.*, § 948.

In *McKibbin v. Brown*, 1 *McCarter* 13, the bill was filed by the lessee to enforce the specific performance of a covenant for renewal. The bill was open to the objection now urged, but it was not suggested as a ground of defence, although the case was warmly contested, both in this court and in the Court of Appeals.

The present case falls directly within the same principle. The grantee in the deed covenanted to reconvey whenever she should quit the actual occupation of the premises, though the grantor was under no obligation to accept the title. It is in fact a contract in which the obligation to perform rests

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upon one of the parties, and which will be enforced in equity with great caution. *Chesterman v. Mann*, 9 *Han.* 206; *Allen v. Hilton*, 1 *Fonb. Eq.* 425, note; *Fry on Spec. Perf.*, § 291-2, § 733.

It is further objected that the contract will not be enforced, because the price to be paid for the reconveyance of the land is not ascertained by the contract. The agreement is that the land shall be reconveyed for a *fair price*, if the grantor will accept the deed and pay such price.

It is urged that the effect of the agreement is simply to give to the vendor the refusal of the property, if the parties could agree upon the price. If such be the effect of the contract, the court will not decree a specific performance. An agreement for the sale of land, at a price to be ascertained by the parties, is too incomplete and uncertain to be carried into execution by a court of equity. *Graham v. Call-Munf.* 396.

But where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price, or at a fair valuation, the court will direct valuation to be made by a master, and will enforce the execution of the contract. *Gaskarth v. Lord Lowther*, 12 *B. & S.* 107; *Wilks v. Davis*, 3 *Mer.* 507; *City of Providence v. John's Lodge*, 2 *Rhode Island R.* 46; *Dike v. Greene*, 2 *Rhode Island R.* 285; *Fry on Spec. Perf.*, § 219.

This class of cases has given rise to some conflict of opinion, and the line which marks the limits of the court's exercise of jurisdiction, is not clearly defined. The true principle seems to be, that whenever the price to be paid can be ascertained, in consistency with the terms of the contract, performance will be enforced. But the court will not make a contract for the parties, nor adopt a mode of ascertaining the price, not in accordance with the real spirit of the agreement. In this case, the mode in which the price shall be fixed, is not designated in the contract. It is required simply that it be a fair price. To ascertain that value, by any mode of investigation, will conflict neither with the letter, nor with the

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spirit of the contract. I think, therefore, the contract is such as will justify a decree for specific performance.

The covenant for reconveyance is sought to be enforced, not against the covenantor, but against the alienee of the land. The covenant is merely personal. It neither runs with the land, nor binds the alienee at law. It will be enforced against the alienee, in equity, only where he is chargeable with notice of the original contract. *Jackson's case*, 5 *Vin. Ab.* 543, § 3; *Taylor v. Stibbert*, 2 *Vesey* 437; *Fry on Spec. Perf.*, § 135, § 137.

There is no proof of actual notice to the alienee. At the time of the conveyance from Phebe Woodward, the covenantor, to James F. Robinson, the deed from the complainant to Phebe Woodward was not on record. There is no evidence that Robinson had ever seen that deed before he received the title. He denies that he ever saw it, or that he had any knowledge whatever of the existence of the covenant, at the time of the conveyance to him. He is, nevertheless, chargeable with constructive notice. All the defendants claim title through the deed from the complainant to Phebe Woodward, which contains the covenant which is sought to be enforced. Notice of a deed is notice of its contents. And where a purchaser cannot make out a title but by a deed, which leads him to another fact, he will be deemed to have knowledge of that fact. 4 *Kent's Com.* 179; 2 *Sugden on Vendors* (7th Am. ed.) 559, § 63; 1 *Story's Eq.*, § 400.

In this aspect it is immaterial whether the deed was or was not recorded.

It avails nothing that the defendants deny actual notice. Constructive notice is knowledge imputed on presumption, too strong to be rebutted, that the knowledge must have been communicated. 1 *Story's Eq. Jur.*, § 399; 2 *Sugden on Vendors* 1041, § 7.

It is further objected that, admitting the defendants to be chargeable with notice, the complainant is not entitled to relief, on the ground that his conduct at the time of the sale

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and conveyance to James F. Robinson, was calculated to mislead him in regard to his rights as a purchaser.

By the terms of the covenant, Phebe Woodward engaged to reconvey the premises to the complainant whenever she should quit the actual occupation of the land and premises, provided the complainant would accept the conveyance and pay the price. In the spring of 1845 she left the premises and removed to the city of New York. About the first of October following, Robinson called upon the complainant and viewed the premises, with the intention of purchasing. It is obvious, from the evidence not only of Robinson but of the complainant himself, that he was aware of Mrs. Woodward's desire to sell, and of Robinson's intention to purchase. He says, that from what he understood from Robinson, he had reason to believe that she would sell without his consent. He gave Robinson no intimation of his intention or willingness to accept a reconveyance. Immediately thereafter, he had an interview with Mrs. Woodward, in the city of New York. He made no demand of a conveyance; gave no intimation that he was willing to accept it. The object of his visit was not to protect his rights under the covenant, but to obtain from Mrs. Woodward the payment of a debt which she owed him. On his return from New York, without having obtained security for his debt, he sued out a writ of attachment against Mrs. Woodward, as a non-resident debtor, which he caused to be served upon the land in question, before the deed to Robinson was executed. Robinson, having obtained his title, entered into possession, and while so in possession, he paid and satisfied to the auditors in attachment, with the knowledge and concurrence of the complainant, the debt for which the attachment was issued, together with the claims of other attaching creditors, which had become encumbrances on the land. The complainant not only tacitly assented to the sale and conveyance by Woodward to Robinson, but he actively participated, by receiving a part of the purchase money.

By the terms of the contract, he was as much bound to

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mand a deed, or intimate his willingness to accept it, as the vendor was to reconvey. No deed could be tendered till a price was agreed upon. The obligation to convey was operative, unless he was willing to accept the deed and pay the purchase money. Yet he stood by and permitted the purchaser to acquire title, to take possession of the premises, to pay the purchase money, without an intimation of his mind under the covenant, or of his willingness to accept the deed if it was tendered to him. Such conduct would estop a party from enforcing a legal title; with more reason it estates to deprive a party of all claim to relief at the hands of this court. The conduct of the complainant operated as a waiver of his equitable claim under the covenant, as against James F. Robinson and those claiming under him.

An equally decisive objection to the relief asked for, is the delay on the part of the complainant in seeking to enforce his claim. Robinson acquired title, and entered into possession of the premises in October, 1845. The complainant's bill was filed in April, 1862, more than sixteen years after the date of the conveyance. His first formal notice of his claim to one of the defendants, was made on the twenty-first March, 1861. There is strong presumptive evidence in the case, that until about that period, he had no intention or desire to enforce his claim to a conveyance under the stipulations of the covenant. This great delay, unaccounted for, is a bar to a claim for a specific performance of the contract. A party, in the language of Lord Alvanley, "cannot call upon a court of equity for specific performance, unless he has shown himself ready, desirous, prompt, and eager." *Felward v. Earl of Thanet*, 5 Vesey 720, note b.

In the language of Lord Cranworth, "specific performance is a relief which this court will not give, unless in cases where the parties seeking it, come as promptly as the nature of the case will permit." *Eads v. Williams*, 4 *De Gex, M. & G.* 691; *Fry on Spec. Perf.*, § 732-3.

A bill for specific performance is an application to the discretion, or rather to the extraordinary jurisdiction of equity,

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which cannot be exercised in favor of persons who have slept upon their rights, and acquiesced in a title and possession adverse to their claim. 1 *Sugden on Vendors* 2^o § 3, 4, 5.

No excuse is furnished by the facts set out in the bill explanatory of the delay. Phebe Woodward did not die in 1849, more than three years after Robinson had acquired title and possession of the premises under her. The subsequent controversy in Vermont, touching the validity of the will of Nancy Robinson, and the conflicting claims of the defendants to the premises, presented no obstacle to the complainant's suit. The decision of the question in Vermont did not, as the complainant himself alleges, conclusively settle the question of title. The same difficulty as to the title which is alleged as a ground for the delay, continued to exist when the bill was filed.

Nor is the objection on the score of delay waived by the fact, that negotiations for a conveyance were had between the parties, on the assumption of the complainant's claim to a reconveyance. There was no admission by the defendants of the complainant's right to the conveyance under the covenant, nor any waiver, express or implied, of any defence to such claim. The negotiations for the purchase were first commenced, and the price agreed upon, before the complainant's claim to a conveyance was presented or insisted on. It is evident, indeed, from the whole tenor of the evidence, and especially from the written correspondence between the parties, that the complainant's claim was not set up, and that the bill was not filed, so much for the purpose of enforcing a compliance with the covenant, as for the sake of acquiring a satisfactory title, and ascertaining to which of the defendants the purchase money should be paid. The defendants were willing to convey. The parties had virtually agreed upon the price. The only question was, to which of the defendants the purchase money should be paid. The bill was evidently filed under an impression on the part of the solicitor that the bill would not be resisted, but that the defendant

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would acquiesce in a determination by this court of their conflicting claims. That expectation proves not to have been well founded.

The bill must be dismissed.

**GEO^RE^OGE BELFORD and others, partners, &c., vs. JOSEPH B.
CRANE and wife.**

1. Where the cause is heard upon bill and answer, the answer must be taken as conclusive proof of the *facts* which it sets up by way of defence. But intentions and motives are not facts, touching which the answer is conclusive.

2. Where a wife takes the title to land, purchased with the property of the husband, under circumstances which render the transaction fraudulent as against the husband's creditors, she will be treated as a trustee for the creditors, and the property will be sold for their benefit.

3. The legal title to land is not affected by a sheriff's deed, where, at the time of the levy and sale, the title was not in the defendant in execution.

4. The existence of fraud is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted. A voluntary settlement on the wife by a husband while engaged in business, and involved in debt, is fraudulent as against creditors, no matter how pure the motive which induced it.

5. The right of the husband to the services of his wife, and to the avails of her skill and industry, is absolute. The wife can acquire no separate property in her earnings, though she carry on business in her own name, except by gift from her husband.

6. A settlement by the husband upon the wife, in consideration of meritorious services, is a pure gift or voluntary settlement, and though good as against the husband, can only be sustained against his creditors by virtue of an antenuptial contract.

7. If a party is indebted at the time of a voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of fraud.

8. The distinction between *existing* and *subsequent* debts, in reference to voluntary conveyances, is, that as to the former, fraud is an inference of law; as to the latter, there must be proof of fraud in fact.

9. The act of 1852, for the better securing the property of married

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women, confers upon the wife a mere *jus tenendi*. It gives her no power to dispose of her property.

10. The land having been purchased with the money of the husband, there is a resulting trust in his favor. The wife will be declared a trustee for the husband, for the benefit of his creditors.

Vanatta, for complainants.

Pitney, for defendants.

Cases cited by complainants counsel. *Reade v. Livingston*, 3 Johns. Ch. R. 497; *Cook v. Johnson*, 1 Beas. 52; *Satterthwaite v. Emley*, 3 Green's Ch. R. 489; *Townsend v. Westcott*, 2 Beavan 340; 1 Story's Eq. Jur., § 353, § 374; 1 Fonb. Eq., ch. 4, § 12; 3 Stark. on Ev. 615, 622; *Turnor's case*, 8 Coke 132, (262); *Bovy's case*, 1 Vent. 194; *Douglas v. Waad*, 1 Chan. Cases 100; *Holford v. Holford*, *Ibid.* 217; *Colvile v. Parker*, Cro. James 158; *Evelyn v. Templar*, 2 Bro. Ch. R. 148; *Burrell's case*, 6 Coke 72; *Gooch's case*, 5 Coke 60; *Doe v. Routledge*, Cowper 705, 711; *Townsend v. Windham*, 2 Vesey, sen. 11; *Nix. Dig.* 762, § 8; *Freeman v. Orser*, 5 Duer 476.

Cases cited by defendants counsel. *Megrath v. Robertson's Adm'rs*, 1 Doss. 445; *Pinney v. Fellows*, 15 Vt. 525; 1 Bright on *Husb. and Wife*, 230, 232.

THE CHANCELLOR. The complainants having recovered judgment at law against Joseph B. Crane, caused an execution to be levied on certain real estate, the legal title to which was in the wife of Crane. On the twenty-fourth of June 1861, the land was sold by virtue of the execution, and the complainants became the purchasers, and received a deed from the sheriff in pursuance of the sale. The bill charged that the property was in fact, the property of the husband, but that the title was vested in the wife, for the purpose of defrauding the husband's creditors. The prayer of the bill

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is, that the deed to the wife be declared void, and that she be decreed to convey her title to the complainants, or that the property be sold under the order of the court, to satisfy the claim of the complainants against the husband.

The case is heard upon bill and answer, and the right rests upon the admissions and allegations of the answer, which must be taken as conclusive proof of the *facts* which it sets up by way of defence. *Lubé's Eq. Pl.*, 109.

The answer admits the judgment of the complainants; the levy upon the real estate standing in the name of the wife, and the sale and conveyance to the complainants. It also admits that at the time of the marriage of the defendants, the wife was not possessed of any property, real or personal, and that she has not received, by descent, devise, or gift, from any person since her marriage, any property whatever. It avers that the wife was a tailoress, and that, by her labor and exertions as a tailoress, in addition to her ordinary household duties, and by keeping boarders, during a course of years, she earned a large sum of money, amounting, as the defendants believe, to about one thousand dollars; that the real estate in question was purchased in the years 1857 and 1858, and the title taken in the name of the wife. That at the time of the purchase, the defendant, Joseph B. Crane, was indebted upon his mortgages and notes given for the purchase of real estate, for his current coal bills, bought on the usual credit for the purposes of his business, and for his family expenses; and that all the debts then due, except about \$275, have been paid and satisfied, as the same matured. The defendants admit that when the land was purchased the husband expected to continue in business, but deny that he intended to contract any new indebtedness, except in the ordinary course of his business. They also deny that the title was taken in the name of the wife to hinder and delay creditors, or with any expectation of insolvency. In the fall of 1858 and in the spring of 1859, a house was erected upon the land at a cost of \$1700, of which \$700 was paid and \$1000 raised by mortgage upon the property. In the year

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1859, the business of the husband having been much enlarged, proved disastrous, and he was unable to meet his engagements and became insolvent. In 1860, a judgment having been recovered against him, the land which had been conveyed to the wife was levied upon and sold as the property of the husband, and was struck off and conveyed to the attorney of the plaintiffs in execution for the sum of \$5. On the ninth of October, 1860, the land was again conveyed to the wife for the consideration of \$400, the husband having negotiated the purchase in behalf of the wife. Three hundred dollars of the purchase money was raised by a mortgage on the premises, and the balance was paid out of the funds of a third party, in the hands of the wife, and was also afterwards secured by mortgage on the property.

The fact that the legal title to the land was never in the husband cannot affect the substantial question at issue, though it may affect the mode of redress. If the property, vested in the wife, was purchased with the property of the husband, under circumstances which render the transaction fraudulent as against the husband's creditors, the wife will be treated as a trustee for the creditors, and the property sold for their benefit.

Nor can the question at issue be materially affected by the sale of the property under execution against the husband, and its subsequent conveyance to the wife. She paid not one dollar consideration for the reconveyance to herself, out of any funds of her own. The entire consideration was raised by mortgage upon the premises, leaving both the legal and the equitable title unaffected, save that the property was charged with an additional encumbrance. The wife acquired no legal title whatever under the deed from the sheriff's grantee. The legal title, at the time of the levy and sale by the sheriff, was not, and never had been in the defendant in execution. The sheriff's deed, therefore, could not affect the legal title. All that it could effect, and probably all that it was designed to effect, was to lay the foundation for proceeding in equity.

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The whole controversy turns upon the validity of the transfer of the property from the husband to the wife. The case, as it appears from the answer of the defendants, is, that about the year 1856, Joseph B. Crane, the husband, being a man of limited means, embarked in the business of buying and selling coal. A considerable portion of his property was in real estate, and he resorted to loans for the purpose of carrying on his business. The wife, at the time of her marriage, had no property whatever. She has never since received any by descent, devise, or bequest. All the property since vested in her, has been purchased with means which belonged to her husband. When he commenced business, the whole real estate of the husband was in his own name. Soon afterwards, while his real estate was subject to mortgage and he was carrying on business upon borrowed capital, the real estate owned by the husband was sold, and the land in question was purchased and the title taken in the name of his wife. The land was purchased in the years 1857 and 1858, at a cost of \$750. In the fall of 1858 and in the spring of 1859, a house was erected upon the premises at a cost of \$1700, making the total cost of the property \$2450. So far as can be learned from the answer, that exceeded the whole amount of property ever owned by the husband, clear of debts. The answer does not show that he ever, while in business, was possessed of \$2000, clear estate. In the summer of 1858, about the time he commenced building, he sustained a serious loss, and in the fall of 1859, within six months after his house was finished, he was unable to pay his debts, and, in the language of the answer, "went to protest." Thereupon the business was carried on in the name of the wife, the coal being purchased by a third party, and the husband, as the agent of the wife, retailing the coal and accounting for the proceeds to the purchaser, or applying it in payment of the notes. In the spring of 1856, when the husband commenced business, he had been married fifteen years. There was no antenuptial or postnuptial settlement, or agreement for settlement on the wife. The whole property stood in the name

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of the husband. In 1857 he commenced the transfer of his property to his wife, and by the spring of 1859, while the husband was still engaged in business and extending his operations, every vestige of property that he owned was in the name of his wife. The transfer was not made by a deed of settlement. There was no declaration of a purpose by the husband to appropriate a specific portion of his property for the use of the wife, but the property, from time to time, was purchased in the name of the wife, and a house subsequently erected thereon with the means of the husband. That property the husband continued to use and enjoy after the change of title as fully as he had done before. The only substantial change was, that it was placed beyond the reach of his creditors. It is very difficult, on a simple view of the facts presented by the answer, to resist the impression that this whole arrangement was made for the purpose of placing the property of the husband beyond the reach of the husband's creditors. It is true the answer denies the fraudulent intent or motive, but intentions and motives are not *facts*, touching which the answer is conclusive. *Cook v. Johnson*, 1 Beas. 53.

The existence of fraud is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted. A voluntary settlement on the wife by a husband while engaged in business and involved in debt, is fraudulent as against creditors, no matter how pure the motive which induced it.

It is urged that the transfer of the property to the wife will be sustained in equity, because it was purchased in part with the avails of the wife's labor. Both at common law and in equity, the husband is entitled not only to the personal property which the wife owns at the time of her marriage, but to all that she acquires by her skill or labor during coverture. His right to her services and to the avails of her skill and industry, is absolute. The wife can acquire no separate property in her earnings, except by gift from her husband. Even where she carries on business in her own name,



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the avails of the business are the property of the husband. This subject was considered and decided in *Skillman v. Skillman*, 2 *Beas.* 403, where many of the authorities will be found. That decision has since been affirmed by the Court of Appeals.

The answer contains no averment of a settlement of the husband on the wife in consideration of her meritorious services, or of a gift to her of the avails of her labor. The defendants, on the contrary, admit that no part of the money invested in said house and lots was furnished by the wife, but they allege that it was the proceeds of the joint labor of the defendants in former years, and from the increase in value of the real estate purchased by the proceeds of such joint labor. They further allege that no account was kept of the earnings of the wife, nor were they kept separately, but they were united with the earnings of the husband, and the surplus, after defraying the expenses of the family, were laid up and invested by the husband. These facts prove incontrovertibly that the land was purchased with the property of the husband, and the title taken in the name of the wife. There is no allegation that the conveyance was designed as a postnuptial settlement upon the wife, or as a gift to her for her services. The frame of the answer excludes such an inference. The wife claims the property, not as the gift of her husband, but as an equitable recompense for meritorious services.

But if the answer had alleged a settlement by the husband in consideration of those services, it was a pure gift or voluntary settlement, and though good as against the husband, could only be sustained against the creditors by virtue of an antenuptial contract. *Clancy on Husb. and Wife* 276, 277.

In regard to antecedent creditors, there seems no room for question as to the invalidity of the title. The doctrine, as stated by Chancellor Kent and adopted by this court, is, that "if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstances will permit those debts to be affected

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by the settlement, or repel the legal presumption of fraud. *Reade v. Livingston*, 3 Johns. Ch. R. 500; *Cook v. Johnson*, 1 Beas. 54.

The distinction between existing and subsequent debts, reference to voluntary conveyances, is, that as to the former, fraud is an inference of law; but as to subsequent debts, there is no such necessary legal presumption, and there must be proof of fraud in fact. *Reade v. Livingston*, 3 Johns. Ch. R. 497, 502; *Cook v. Johnson*, 1 Beas. 54.

I think the facts of this case, as disclosed by the answer, leave no reasonable room for doubt that the vesting of property in the wife was effected in contemplation of present and future indebtedness, and with the view to hinder, delay, and defraud creditors.

Independent of all other badges of fraud, the large amount settled on the wife, considered in relation to the husband's means, is in itself a very unusual and suspicious circumstance. A settlement honestly made always has relation to the husband's pecuniary ability. In *Beard v. Beard*, 3 A. & R. 72, Lord Hardwicke said: "A court of equity will not suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which all the wife is entitled to."

Courts have manifested a strong disposition, and very properly, to protect *bona fide* settlements made by a husband in favor of a wife. But it is material to bear in mind that he is no settlement by the husband for the separate use of the wife. The absolute interest in and control over the property, to the entire exclusion of the husband, is not vested in the wife, as it would be in case of a conveyance to trustees for her use. Independent of the statute of 1852, for the better securing the property of married women, the husband would have a right to the income of the property during the life of the wife, and on her death he would become tenant by the courtesy. And notwithstanding the statute, the wife has no power to dispose of her property. The statute confers on her merely the *jus tenendi*. She can neither alien nor de-

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vise it. She holds it really for the benefit of her husband during his life, and for his children upon her death. He cannot be ejected by the wife. In the language of Mr. Justice Vredenburgh, "he is entitled to live in her house and to eat at her table." Upon her death he becomes the owner of the property for life, as tenant by the courtesy. *Naylor v. Field*, 5 Dutcher 287; *Johnson v. Cummins*, February T., 1863. He has, for all practical purposes, as full enjoyment of the property for his life, as he would have if the legal title were in himself, save only that he cannot alien or encumber it. The essential difference is, that while the title is in the wife it is beyond the reach of the husband's creditors. Such a transaction is in itself calculated to awaken suspicion and challenge investigation. It affords an easy and convenient cloak for fraud, with little inconvenience to the husband, while the title remains in the wife, and equal facility for restoring the title to the husband the moment the claims of creditors are compromised. It furnishes no adequate protection to the rights of the wife against the unscrupulous importunities of the husband. Such a transaction has, in my judgment, but little claim to the favorable consideration of a court of equity.

The complainant is entitled to relief. The land having been purchased with the money of the husband, there is a resulting trust in his favor. The wife will be declared a trustee for the husband, for the benefit of the creditors. The precise form of relief will be best settled when the defendants, who hold encumbrances created by the wife, shall have been heard. As at present advised, I think the proper mode of relief would be to direct the property to be sold, and the proceeds applied, after satisfying encumbrances, to the payment of the complainants' claim.

No actual fraud is imputed to the wife. Her interest in the property, as against the husband's creditors, will be secured to her to the extent of the value of her dower, in case the title had been vested in the husband, subject, however, to encumbrances created voluntarily by herself.

Miller v. Gregory.

JACOB MILLER vs. ELIZABETH L. GREGORY.

1. A defendant cannot pray anything in his answer but to be dismissed the court. If he has any relief to pray, or discovery to seek against the complainant, he must do so by cross-bill.

2. An answer to a bill to foreclose cannot draw in question the fairness and validity of a sale, the purchase money whereof the mortgage was given to secure, or impeach the contract on which the title of the mortgage is founded. These matters can only be drawn in question by cross-bill.

Ogden, for complainant.

Fleming, for defendant.

THE CHANCELLOR. The defence which the defendant sees to set up by her answer, can only be made available by cross-bill. A defendant cannot pray anything in his answer but to be dismissed the court. If he has any relief to pray, discovery to seek against the complainant, he must do so by cross-bill. *Lubé's Eq. Pl.* 55, 142; *3 Daniell's Ch. Pr.* 17.

There are, it is true, general allegations in the answer that nothing is due upon the complainant's mortgage, and that it was obtained by false and fraudulent representations. But the substance of the defence is, that the defendant was fraudulently induced to become the purchaser of the mortgage premises from the complainant at a price beyond its real value, and to give the mortgage now sought to be foreclosed to the complainant, for a portion of the purchase money. It draws in question the fairness and validity of the sale made by the complainant to the defendant, and seeks to impeach the contract on which the title is founded. These matters, if available at all as a defence to this suit, can only be drawn in question by cross-bill. The complainant is entitled to the benefit of his answer to these charges of fraud.

But admitting the defence to be available, it is not sustained by the evidence. The material averments upon which

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he defendant relies to sustain the defence, consist of new matter, not responsive to the bill. Of the truth of these averments the answer is no proof. They must be established by evidence. *Neville v. Demeritt*, 1 *Green's Ch. R.* 335; *Fisler v. Porch*, 2 *Stockt.* 248; *Stevens v. Post*, 1 *Beas.* 408.

There is a total failure of proof to sustain the case presented by the answer. All that the proof establishes is, that **the** defendant paid too high a price for the land. There is no satisfactory proof of fraud, or of such abuse of confidence as will entitle the defendant to relief in equity against the mortgage.

ISRAEL W. MOORES vs. MARY E. MOORES.

1. An answer to a bill for divorce on the ground of desertion, which sets up as a defence a general and vague charge of cruelty on the part of the husband, without specifying any act of cruelty, or making any statement from which it can be discovered in what the cruelty consisted, is radically defective.

2. The defendant is bound to state in his answer all the circumstances of which he intends to avail himself by way of defence, and to apprise the complainant in a clear and unambiguous manner, of the nature of the case he intends to set up.

3. Evidence must be confined to the issue made by the pleadings, and all evidence in support of totally distinct facts from those relied upon in the bill or answer, is irrelevant, impertinent, and inadmissible.

4. Under general allegations particular instances may be proved, but in such cases the general charge must be of such precise and definite character, as to apprise the adverse party of the nature of the evidence to be introduced.

5. A court of equity will not deprive a defendant of his defence upon a mere technicality of pleading, when its admission affects prejudicially no right of the complainant.

6. The conduct which will justify the wife in abandoning her husband, must be such as would constitute a ground for divorce or alimony.

7. The mere separation of husband and wife does not constitute desertion within the meaning of the statute. To constitute desertion, the wife must absent herself from her husband of her own accord, without his consent and against his will.

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8. A bill will not lie for divorce on the ground of desertion, where the parties are living apart under articles of separation or by mutual agreement, and where the party seeking it has not expressed a desire to terminate the agreement.

9. A voluntary agreement between husband and wife to live separately constitutes no bar to an action, by either of the parties, for a restitution of marital rights. Nor does it operate in the eye of the law, as a release of either of the parties from their matrimonial obligations.

R. S. Green, for complainant.

Shafer, for defendant.

THE CHANCELLOR. The complainant asks a divorce from his wife on the ground of desertion. The parties were married on the second of January, 1856. On the thirteenth of December, 1856, the defendant left her home without the knowledge or consent of her husband, refused to return, and has since lived separate and apart from him. These facts are not disputed.

The first ground of defence presented by the answer, is that the defendant was compelled to leave her husband "because of his cruel conduct towards her;" that "his conduct was so cruel that she could not live with him." There is no specification of any act of cruelty, nor any statement from which it can even be discovered in what the cruelty consisted. The answer upon this ground was open to exception for insufficiency. But the defendant having taken issue upon the answer, it becomes a material question whether the cruelty of the complainant is properly put in issue by the pleading, and consequently, whether the whole evidence upon the point should not be overruled as impertinent.

It is a familiar principle that evidence must be confined to the issue made by the pleadings. All evidence, therefore, in support of totally distinct facts from those relied upon in the bill or answer, is irrelevant, impertinent, and inadmissible. *Whaley v. Norton*, 1 *Vern.* 484; *Clarke v. Turton*, 11 *Vesey* 240; *Smith v. Clarke*, 12 *Vesey* 477; *Blake v. Mamell*,

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Ball & B. 47; **Stanley v. Robinson**, 1 Russ. & M. 527; **James v. McKernon**, 6 Johns. R. 543; **Chandler v. Herrick**, 3 Stockt. 497; **Gresley's Eq. Ev.**, (ed. 1837) 159, 161.

But the defendant does not attempt to introduce a totally distinct defence from that relied upon in her answer. The husband's cruelty is alleged in the answer as a ground of defence. The real question is, whether, under that vague and general allegation, the defendant shall be permitted to give evidence of the facts relied upon in support of the charge. Under general allegations, particular instances may be proved. Thus, under a charge of insanity, drunkenness, or lewdness, particular acts may be shown. *Gresley's Eq. Ev.*, 161.

In these cases, the general charge is of a precise and definite character, which apprises the adverse party of the nature of the evidence to be introduced. But under a general allegation that the complainant "had withdrawn herself from her husband, lived separately from him, and very much misbehaved herself," or that "she did not behave with that duty and affection that became a virtuous woman, much less this defendant's wife," adultery is not put in issue, and evidence of particular acts cannot be given. *Sidney v. Sidney*, 3 P. W. 269; *Doneraile v. Doneraile*, *Buller's N. P.* 296.

The general charge of cruelty is of the most vague and indefinite character. It may consist of acts of omission or commission; of acts in themselves lawful or unlawful. Its operation upon the party aggrieved, may either be corporeal or merely mental. Adultery by the husband is the grossest cruelty that can be inflicted upon a wife; and yet it will not be pretended that evidence of acts of adultery could be given under a general charge of cruelty. Nor does the objection consist in the mere fact that adultery is itself a distinct offence. It consists also in this further fact, that the charge does not apprise the adversary of the nature of the evidence designed to be offered. It is not evidence in support of the charge of cruelty. The charge of cruelty made against the husband, is highly penal in its character, involving

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a forfeiture of his marital rights. The offence for wh might have incurred such a penalty, ought (in the lang Lord Chancellor Talbot) to be plainly laid to his char; cified, and put in issue. *Sidney v. Sidney*, 3 P. Wr

Now the acts complained of were not in themselves ful. They savored in no wise of cruelty. The cruel exist, consists in facts and circumstances entirely inc ent of and collateral to the acts of the husband, wh not stated or suggested in the answer. How, then, v complainant to know or suspect that these acts wer offered in evidence under the general charge of cruelty a pleading, the answer is radically defective. The def besides answering the complainant's case, is bound t in his answer all the circumstances of which he int avail himself by way of defence. He is bound to app complainant of the nature of the case he intends to and that too in a clear and unambiguous manner. 2 L Ch. Prac. 814.

"The good sense of pleading, and the language books, (says Chancellor Kent) both require, that every allegation of this kind should be put in issue pleadings, so that the parties may be duly apprised essential inquiry, and may be enabled to collect tes and frame interrogatories in order to meet the q Without the observance of this rule, the use of p becomes lost, and parties may be taken at the hea surprise." *James v. McKernon*, 6 Johns. R. 564.

As a matter of principle, I deem the evidence up part of the defendant's case not admissible under the ings, and if its admission affected prejudicially any : the complainant, it should be rejected as irrelevant.

But it is not suggested that the introduction of the e in this case, operated in any wise as a surprise upon tl plainant. It was not objected to before the master complainant had a full opportunity of meeting it. Eidence on his part was withheld on the ground that t proved were not within the issue. Under these circum

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I am unwilling to deprive the defendant of her defence upon a mere technicality. This would not be in accordance with the practice of the court. *Chandler v. Herrick*, 3 Stockt. 499. As the evidence is fully before the court, it is for the interest of both parties that an opinion should now be expressed upon its merits.

The alleged cruelty is thus stated by the defendant herself. "I left my husband on account of his cruel treatment in bed. His intercourse with me was so often and so persisting that I could not stand it. That was the sole cause of my ever leaving him. The treatment I speak of affected my health. My husband's general treatment of me was kind and attentive. I had no cause of complaint as to his general treatment of me." This is the substance of the defence. There is reason to apprehend from the evidence that the sickness, of which the defendant complained, resulted mainly from her pregnancy, and that her desertion of her husband arose from her unwillingness to endure the pains of child bearing. The husband testifies that a short time before she finally left him, she said that she would not live with any man and bring up a family of children. This, in itself, constituted no justification of her deserting her husband. *Learitt v. Learitt*, Wright 719.

It is not questioned that a gross abuse of marital rights, resulting in injury or suffering to the wife, may constitute "cruelty" in the eye of the law, and justify the wife in separating herself from her husband. But no such case is established by the evidence on the part of the defendant. There is no pretence of any peculiar debility or physical infirmity on the part of the wife; no allegation of any violence or compulsion on the part of the husband. Her own evidence shows that she continued to cohabit with her husband prior to the birth of her child, and that a few weeks subsequently she voluntarily returned to his bed. The physician in attendance upon her during her confinement has not been examined. The case, in all its essential features, falls far short of the case made by the petitioner in *Shaw v. Shaw*, 17 Conn. 189,

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which was held by the court insufficient to warrant a divorce on the ground of cruelty.

The conduct which will justify the wife in abandoning her husband, must be such as would constitute a ground for divorce or alimony. *Butler v. Butler*, 1 *Parsons' Sel. Cas.* 329; *Logan v. Logan*, 2 *B. Monroe* 142; *Bishop on M. & Div.*, § 526.

I find nothing in the evidence to establish the charge of cruelty, or to justify the desertion of the complainant by his wife. No opinion is designed to be intimated in favor of the competency of the wife as a witness. That objection was not raised nor considered.

The second ground of defence is, that the wife has lived apart from her husband with his consent.

The evidence shows that the wife left her husband without his knowledge or consent, on the thirteenth of December, 1856. On the second of February, 1857, within two months after the desertion, written articles of separation were entered into by the parties, in which, after reciting that unhappy differences subsist between them, "for which they are agreed to live separate," the complainant, among other things, covenants "that he will permit his said wife, from henceforth during her life, to live separate from him, and stay and reside at such place or places as she pleases." After the execution of the agreement, there is no pretence that the husband has ever expressed his dissent from the agreement, or his desire to terminate it; or has ever, directly or indirectly, requested his wife to return to his house, or intimated his willingness that she should do so.

It is well settled that a mere separation of husband and wife does not constitute desertion within the meaning of the statute. To constitute desertion, the wife must absent herself from her husband of her own accord, without his consent and against his will. *Drake v. Drake*, *Halst. Dig.* 38—
"Divorce," § 1; *Jennings v. Jennings*, 2 *Beas.* 38; *Cook v. Cook*, *Ibid.* 263; *Bishop on M. & Div.*, § 511.

But it is urged that the act of the wife in leaving her

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husband without justifiable cause, and without his consent, was a wilful act of desertion. That she has never since returned, or expressed a willingness to do so, but on the contrary declares that it was then, and ever since has been, her fixed determination not to live with the complainant as his wife. Hence, it is argued that the desertion was wilful, continued, and obstinate. The argument, however plausible, is not sound.

The complainant is before the court, seeking redress for a wrong done by the defendant in refusing to discharge her matrimonial obligations. But what right has he to complain of any act, as a violation of his rights, which was done with his assent. The general maxim of the law is *volenti non fit injuria*. If the complainant has sustained no injury, he has no ground for redress. Admitting that the agreement for separation by the husband and wife was not binding, that the conduct of the wife in absenting herself from her husband was unjustifiable and even criminal, it will not at all aid the complainant's case. Adultery is not less a crime if committed with the husband's consent; but no principle is better settled, or founded upon clearer reason, than that no divorce in such case will be granted at the instance of the husband. Nor is the case at all altered by the declared unwillingness of the wife to return to her husband. The right of the husband to redress must depend, not upon the intent, but upon the overt act of the wife. The simple inquiry is, has the wife, for the space of three years, absented herself from her husband without his consent and against his will? If she has not, her desertion is not, within the contemplation of the law, wilful and obstinate.

In *Butler v. Butler*, 1 *Parson's Sel. Cas.* 335, where this question was under consideration, the court said: "Although no court determining on the marriage relation, recognizes such consent separations as arrangements strictly legal; yet, when it is clearly shown that the withdrawal of a wife or husband from mutual cohabitation, has been the result of such an understanding or agreement; or where the with-

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drawal of one has received the subsequent approbation of the other, the continuity of absence, under such circumstances, is not a wilful and malicious desertion. The malice of the desertion arises from its being the perverse act of the one, in refusing the performance of the matrimonial obligations and duties, which the other has the legal right to require. But when such separation has been the result of mutual arrangements, and these clearly established in proof, then each is in equal fault in this particular, and neither can claim a legal right against the other, in consequence of an act in which he or she has been an equal participant. Such assent or acquiescence, however, are revocable acts; and if either party persists in a state of separation after such revocation, he or she thenceforth occupies the position of a party quitting cohabitation on his or her own motion."

It is further urged that a voluntary agreement by husband and wife to live separate is not regarded by the courts as binding, and hence it is insisted that the agreement of the husband can constitute no defence for the desertion of the wife. It is true that courts do not favor agreements by husband and wife to live apart. They are regarded as against the policy of the law, and although not treated for all purposes as absolutely void, they constitute no bar to an action by either of the parties for a restitution of marital rights. Nor does it operate, in the eye of the law, as a release of either of the parties from their matrimonial obligations. It will not, therefore, be permitted to stand in the way of the restitution of such rights and the enforcement of such obligations. But the principle is invoked by the complainant, not for the purpose of sustaining the policy of the law and enforcing the performance by the wife of her conjugal duties, but for the purpose of destroying the marriage relation, in direct contravention of the policy of the law. It would be a gross perversion of the principle to abrogate the contract under color of maintaining the rights of the husband, and thus inflict upon the wife the severest penalty for an act done with the husband's assent.

The complainant's bill must be dismissed.

Grinnell v. Merchants Insurance Co.

BRENTON B. GRINNELL vs. THE MERCHANTS INSURANCE COMPANY.

1. A creditor of an insolvent corporation, who shows a reasonable excuse for not presenting his claim within the time limited by the order of the court in proceedings under "the act to prevent frauds by incorporated companies," *Nix. Dig.* 371, will be admitted at any time before actual distribution, or even after partial payments, if there be a surplus in the hands of the receivers, so as not to interfere with payments already made.
 2. A creditor does not, by such presentation, obtain a *vested right* to a certain dividend to the exclusion of others.
 3. The fact that the petitioner was an officer of the corporation, and that the proceedings to establish its insolvency were instituted in his name, cannot prejudice his right to be let in to prove his claim before the receivers.
 4. Ten days allowed to present claim.
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This was an application by a creditor of an insolvent corporation, to be let in to prove his claim before the receivers.

W. B. Williams, for the petitioner.

I. W. Scudder, for the receivers, contra.

THE CHANCELLOR. Under the provisions of the act to prevent frauds by incorporated companies, *Nix. Dig.* 371, the defendants were declared insolvent, an injunction issued, and receivers were appointed. The time limited for the creditors to present their claims having expired, the petitioner now asks to be let in to prove his claim before the receivers.

The bias of the court, on application to be let in to prove, is in favor of the creditor. The design of the statute is to secure an equal distribution of the assets of the corporation among all its creditors. In practice, an order is made limiting a time within which claims shall be presented and proved, in order to facilitate the proceedings, and to promote despatch in the settlement of the estate. But no creditor thereby obtains a *vested right* to a certain dividend to the exclusion of others.

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If a reasonable excuse for delaying to make an early claim is shown, the creditor will be admitted at any time before actual distribution, or even after partial payments there be a surplus in the hands of the receivers, so as not interfere with payments already made. *Lashley v. Hogg, Vesey* 602; *Gillespie v. Alexander*, 3 Russ. 130; *Wildes Keeler*, 3 Paige 164; *Pratt v. Rathbun*, 7 Paige 271 *Smith's Chan. Prac.* 267.

The petitioner has satisfactorily accounted for not presenting his claim within the time limited by the order of the court. The claim originated in the petitioner's becoming bail in error for the corporation, and in his being compelled to pay the judgment recovered against them. He held bond and mortgage as security for the amount thus advanced upon which a foreclosure suit was instituted, and the existence or extent of the deficiency of the amount realized upon the mortgage to satisfy the claim of the petitioner, was not ascertained when the time limited for presenting claims expired. He was induced, moreover, by the declarations of the receivers, to believe that the formal presentment and proof of his claim was unnecessary.

The fact that the petitioner was an officer of the corporation, and that the proceedings to establish its insolvency were instituted in his name, cannot prejudice his claim to the relief prayed for. It is not suggested that any delay or prejudice to the rights of the creditors has resulted from the circumstances. The evidence does not warrant the allegation of the answer that the petitioner either agreed, or became liable in equity, to accept the bond and mortgage in his hands, in satisfaction of the amount advanced by him as bail for the corporation. He was under no obligation to receive less than the full amount advanced. There is nothing in any of the objections raised by the answer of the receiver sufficient to bar the petitioner of his right to present his claim and to share in the distribution of the assets. The petitioner will be allowed ten days from the date of the order to present his claim to the receivers.

Nicholson v. Janeway et al.

JOHN B. NICHOLSON vs. WILLIAM R. JANEWAY and others.

1. An undue concealment of a fact to the prejudice of another, which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent, constitutes a fraud against which equity will relieve.
2. In all transactions between partners, and all parties occupying towards each other a fiduciary character, the law requires the utmost degree of good faith.
3. If a partner who superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchases the share of another partner for an inadequate price, the purchase will be held void, and the purchaser compelled to account for the real value.
4. Nor does it affect the case that the alleged concealment is charged to have been practiced by one partner only, and that the others were ignorant of the fact concealed. The principle applies, whether the fraud was perpetrated by the party directly interested, or by *an agent*. The principal by seeking to retain any benefit resulting from the transaction, becomes *particeps criminis*, however innocent of the fraud in its inception.
5. Equity will relieve against a contract made under a mistake, or ignorance of a *material* fact; not only where there has been a concealment of facts by one party, but also in cases of mutual mistake or ignorance of facts.
6. To constitute a fraud or mistake for which equity will relieve against a contract, it is essential that the fact misrepresented or concealed be *material*. It must either affect the substance of the contract, or the value of the thing bargained for; or be such as induces the party aggrieved to pay more, or accept less, for the thing bargained for, than its real value.
7. Equity will not grant relief against a contract on the ground of mistake, when the mistaken fact did not operate as an inducement to enter into the contract.

H. V. Speer, for complainant.

Schenck, for defendants, cited *Farrar v. Alston*, 1 Dev. L. R. 69; *Saunders v. Hatterman*, 2 Ired. L. R. 32; 2 Kent's Com. 487.

THE CHANCELLOR. In the year 1861, the complainant and the defendants were co-partners in the business of manu-

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facturing and selling paper hangings. By the terms of contract, the partnership was to continue until the first July, 1864. By an agreement entered into on the seventeenth of December, 1861, between the defendants on one part, and the complainant of the other, the co-partnership subsisting between them was dissolved, and the defendants having associated themselves as partners in a new firm agreed to purchase the interest of the complainant in the assets and business of the old firm, upon certain conditions specified in the agreement. The agreement was intended to operate, and virtually did operate as a withdrawal of the complainant from the firm, and a transfer of his interest in the partnership concerns to his co-partners, the defendant. In pursuance of the articles of dissolution, the complainant retired from the firm on the thirty-first of December, 1861, but continued in the employ of the defendants at a stipulated salary, until the twenty-first of April following, when he was discharged from their service. On the sixth of October, 1862, the complainant filed his bill in this cause, praying that the articles of dissolution may be declared null and void, and that the complainant may be restored to his membership in the firm, from the date of the articles of dissolution, and to all his rights as a partner.

Previous to the year 1861, the affairs of the concern had been prosperous, but upon the breaking out of the rebellion and the consequent depression and embarrassment of the market, its business was greatly diminished, and the firm was threatened with heavy losses. From July until December, 1861, its manufactory was closed. In this state of things the complainant expressed a desire to withdraw from the firm, which his co-partners assented, and a dissolution of the partnership was agreed upon and executed. One of the terms of dissolution was, that the books and accounts of the firm should be balanced and the amount ascertained, to be paid under the articles of co-partnership, the complainant being entitled, excluding therefrom all doubtful claims. That the amount thus ascertained, the defendants should give

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ates at six, twelve, and eighteen months. That the suspended or doubtful debts should be collected by the defendants, and the complainant's share of the net proceeds paid to him from time to time, as it should be collected. It turned ~~at~~ upon a settlement of the accounts, that instead of their being a cash balance due the complainant at the date of the dissolution, the cash balance was against him to the amount of \$1800. The suspended debt, contrary to the expectation of all the partners when they entered upon the negotiation to dissolve, amounted to \$20,917.20. The complainant's portion of this debt was \$4183.44, which exceeded his entire interest in the concern. The true state of the account was ascertained during the progress of the negotiation for dissolution by one of the partners, who was the principal financial manager, and who had charge of the books of the firm. He became satisfied, from an examination of the books, that there would be but little or nothing coming to the complainant upon the dissolution of the firm. This fact was not disclosed to the complainant, but he was suffered to execute the contract under the erroneous expectation and belief that upon his leaving the firm there would be found a cash balance in his favor.

This constitutes the entire equity of the complainant's bill. Admitting the charge to be fully sustained by the evidence, does it furnish any ground for relief in equity?

It is no objection to relief that there was no actual or intentional misrepresentation of a material fact. None is charged. Whether a fraud is effected by silence or by positive misrepresentation, is immaterial. An undue concealment of a material fact to the prejudice of another, which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent, constitutes a fraud, against which equity will relieve. 1 Story's *Eq. Jur.*, § 204.

In regard to partners, and all parties occupying towards each other a fiduciary character, the law to prevent undue advantage from the confidence which the relation naturally cre-

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ates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties. 1 *Story's Eq. Jur.*, § 218.

And hence if a partner who superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchases the share of another partner for an inadequate price, by means of such concealment, the purchase will be held void, and the purchaser compelled to account for the real value. *Maddeford v. Austwick*, 1 *Simp. R.* 89; 1 *Story's Eq. Jur.*, § 220.

And the case is in no wise affected by the fact that the alleged concealment is charged to have been practiced by one of the defendants only, and that the others may be assumed to have been entirely ignorant of the fact in regard to which the concealment was practiced. The negotiation, it is admitted, was conducted by one of the defendants, as well on his own behalf, as the agent, and on behalf of his associates. The principle applies, whether the fraud was perpetrated by the party directly interested or by an agent. The principal, by seeking to retain any benefit resulting from the transaction, becomes *particeps criminis*, however innocent of the fraud in its inception. 1 *Story's Eq. Jur.*, § 193, a.

Nor would the case have been materially altered if all the defendants had been equally ignorant of the fact. A contract made under a mistake or ignorance of a material fact, is relievable in equity. The rule applies, not only where there has been a concealment of facts by one party which would amount to fraud, but also to cases of mutual mistake or ignorance of facts. 1 *Story's Eq. Jur.*, § 140.

But to constitute a fraud or mistake, for which equity will relieve against a contract, it is essential that the misrepresentation or concealment should be practiced, or the mistake made, in regard to a fact *material* to the contract; that is, it must be essential to its character, and an efficient cause of its concoction. 1 *Story's Eq. Jur.*, § 141, § 192, § 195.

Upon this point all the authorities concur. The fact misrepresented or concealed, must either affect the substance of

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the contract, or the value of the thing bargained for ; or, if it be an extraneous fact, it must be such as induces the party aggrieved to pay more or to accept less for the thing bargained for, than its real value.

Now it is not pretended that the complainant was induced, by the mistake under which he labored, to accept less for his interest in the concern than its real value. The prospects of the concern were not in reality better, nor were the value of the assets greater than he believed them to be when he assented to the dissolution. He contracted to receive for his interest in the concern precisely its value at the time of the dissolution, *viz.* his share of the assets realized in cash, or its equivalent, and his share of the suspended debt as fast as it should be collected. The only mistake was, that the suspended debt of the concern was larger than he anticipated, and he consequently received no portion of his interest in cash. It does not appear that he will eventually receive a dollar less than was *anticipated*. He may receive more, though the time of payment be postponed beyond his expectations. I think, therefore, that the mistake is not of such a character as entitles the party to relief in equity.

But what relief can the complainant have ? He does not ask that he shall be paid the full value of his interest in the concern. That is secured to him by the contract. But he asks that the contract for the dissolution shall be rescinded, and that he shall be restored to all his rights as a partner, from the time of the dissolution in 1861. How shall that be done in justice to the other partners ? The complainant contributed but little to the financial capital of the partnership. He was taken into the concern as a partner, as the bill shows, mainly on account of his skill and experience as a manufacturer. That was his contribution to the capital of the partnership. Of that the defendants have been deprived for nearly two years. The partnership, by its limitation, will terminate within nine months. By what principle of equity shall he be permitted to share in the profits of the concern as a partner, when he has contributed nothing of

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skill or capital to the business, and shared in none of the hazards of the enterprise? He was apprised of his mistake, as the bill alleges, immediately after the execution of the contract. Had he then refused to withdraw from the firm; had he insisted upon his rights, and proffered his services as a partner, and called upon this court for its protection, he would at least have had the semblance of equity on his side. But he acquiesced in the contract, withdrew from the firm during its period of depression, and accepted a post of superintendent in the employment of the defendants, at a stated salary, thus escaping all the hazards of the business. And now when business has revived, and the affairs of the firm become more prosperous, he asks to be restored to all his rights as a partner. The relief asked for would be utterly inconsistent with the plainest principles of justice and equity.

The bill must be dismissed.

CHARLES D. WEART vs. SAMUEL K. ROSE.

1. Where it appears that the adjunct of quantity in a deed is used ~~a~~ merely, and not as indicating the precise contents of the land conveyed, a mere deficiency in the quantity is not of itself evidence of a fraudulent intent.
2. Where it appears by definite boundaries, or by words of qualification, that the statement of the quantity of acres in a deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case.
3. Where land is sold by certain boundaries, or for so much for the entire parcel, any surplus over the quantity given belongs to the vendee, and the price cannot be increased or diminished on account of disagreement in measure or quantity.
4. If the sale is by the acre, and the statement of the number of acres is of the essence of the contract, the purchaser, in case of a deficiency, is entitled in equity to a corresponding deduction from the price.
5. Where the difference between the actual and estimated quantity of acres of land sold in the gross, is so great as to warrant the conclusion that the parties would not have contracted had the truth been known.

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such case the party injured is entitled to relief in equity on the ground of *gross mistake*.

6. Where the vendor agrees to convey a farm in gross, "containing about one hundred and fifteen acres of land," and the deed executed in pursuance of the agreement, describes the land by boundaries, and adds, "containing about one hundred and fifteen acres of land," a deficiency of .12 acres will not entitle the purchaser to an abatement of the purchase money.

The cause was heard upon the bill, answer, and proofs.

E. W. Scudder, for complainant.

J. Wilson, for defendant.

Cases cited by complainant's counsel. *Bellknap v. Scaley*, 2 *Duer* 579; *Barnes v. Gregory*, 1 *Head (Tenn.)* 230; *Harrison v. Talbott*, 2 *Dana* 258; *Quesnel v. Woodlief*, 2 *Hen. & Mun.* 173, note; 4 *Kent's Com.* 467; *Lee v. Hester*, 20 *Georgia* 588; *Thomas v. Perry*, 1 *Peters' C. C. R.* 49; *Marrin v. Bennett*, 26 *Wend.* 169; *Stebbins v. Eddy*, 4 *Mason's C. C. R.* 414; 1 *Story's Eq. Jur.*, § 141, 144, a; *Dart on Vendors (Waterman's)* 307-8-9; *Dalton v. Rust*, 22 *Texas* 133; *Couse v. Boyles*, 3 *Green's Ch. R.* 212.

Cases cited by defendant's counsel. *Opdyke v. Stephens*, 4 *Dutcher* 90; *Rogers v. Colt*, 1 *Zab.* 704; *Speer v. Whitfield*, 2 *Stockt.* 107; 2 *Greenl. on Ev.*, § 601-2; 1 *Ibid.*, § 275-6-7; *Ibid.*, § 287-8; *Mann v. Pearson*, 2 *Johns. R.* 37; *Jackson v. Barringer*, 15 *Ibid.* 471; *Jackson v. Defendorf*, 1 *Caines' R.* 493; *Winch v. Winchester*, 1 *Vesey & B.* 375; *Morris Canal Co. v. Emmett*, 9 *Paige* 168; *Stebbins v. Eddy*, 4 *Mason's C. C. R.* 414; *Powell v. Clark*, 5 *Mass.* 355; *Dagne v. King*, 1 *Yeates* 322; *Smith v. Evans*, 6 *Binn.* 102-9; 1 *Story's Eq. Jur.*, § 146, note 2, § 149; *Deare v. Carr*, 2 *Green's Ch. R.* 513; *Penny v. Martin*, 4 *Johns. Ch. R.* 566.

THE CHANCELLOR. The defendant, by deed bearing date on the first of April, 1861, conveyed to the complainant, for

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the consideration of \$11,500, a farm in the township of Ewing, described in the deed as "containing about one hundred and fifteen acres of land." By subsequent measurement, it was ascertained that the farm in fact contained but one hundred and eight acres and eighty-eight hundredths, or about six acres less than it was described in the deed to contain. The complainant gave his bond and mortgage for \$5500, a part of the purchase money. The bill alleges that the price agreed to be paid for the farm was \$100 per acre, and asks that the complainant be permitted to redeem the mortgage by the payment of the balance justly due thereon, after deducting therefrom the price of the deficiency ascertained to exist in the quantity of acres as described in the deed. The relief is sought: 1. On the ground of fraud. 2. Of mutual mistake.

The contract for the purchase of the farm was originally made by Edward Nickleson, the father-in-law of the complainant, and at his instance the deed was made by the defendant to the complainant. The bill charges that the farm was represented by the defendant to Nickleson, at the time of making the contract, to contain one hundred and fifteen acres, and that at the time of making such representations, and at the time of the delivery of the deed, the defendant well knew that the representations were false and fraudulent, and that there was a considerable deficiency from that amount; and that the defendant also exhibited a map and plot of the farm, with the measurements and contents thereon stated, which he well knew were incorrect and calculated to deceive, and which were exhibited to the complainant and to Nickleson for that purpose. The answer admits that he exhibited the map and plot of the farm, as charged in the bill, and stated his belief that the number of acres were truly stated thereon, but fully and explicitly denies that the representation was fraudulent, or that it was false within the knowledge or belief of the defendant.

It appears, from the answer and from the evidence in the cause, that the land in question was part of a farm belong-

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ing to Ebenezer P. Rose, and which was devised by him to his two sons, Jonathan F. Rose and Samuel K. Rose, the defendant. Prior to the year 1840, on the petition of Jonathan F. Rose for partition, the farm was divided between the two brothers, by commissioners appointed by the Orphans Court, and the tract conveyed to the complainant was assigned to the defendant, as his share under the will of his father. The commissioners caused a survey and map of the entire premises to be made, by which the share assigned to the defendant is described as containing one hundred and twenty-eight acres and three quarters. That map, in the familiar handwriting of Thomas Gordon, an experienced surveyor, was delivered to the defendant, on his coming of age, by his guardian, as the evidence of his title. It was exhibited by the defendant to Nickleson at the time of the contract, and delivered to the complainant with the deed for the premises. By deed dated on the seventeenth of June, 1852, the defendant conveyed to his brother, Jonathan F. Rose, a part of the tract assigned to him by the commissioners, which is described in the deed as containing twelve acres, more or less. Assuming the quantity of land thus conveyed to be truly stated at twelve acres, it left in the balance of the tract one hundred and sixteen acres and three quarters, or about one hundred and seventeen acres. The farm was thereafter assessed as containing one hundred and seventeen acres. The defendant, for years prior to the sale to the complainant, paid tax for that quantity of land. It does not appear that the defendant ever had the tract surveyed, or that he had any evidence of the quantity of land contained in the farm, other than that furnished by the map of the commissioners. He had no reason to suspect the accuracy of that survey, nor does it appear from the evidence that its accuracy ever was suspected, by himself or by any one else, until long after the conveyance to the complainant. It was subsequently ascertained that the deed to his brother, instead of twelve acres, contained about fourteen acres, which left the balance of the tract as described in the commissioners' map at one

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hundred and fifteen acres, instead of one hundred and seventeen acres, as previously estimated. On the twelfth of December, 1860, five days before the sale to Nickleson, the defendant offered the farm for sale by the acre, and described it in the conditions of sale, as containing about one hundred and fifteen acres. At the time of the contract, the map was exhibited by the vendor as evidence of the quantity contained in the tract originally allotted to him by the commissioners. The parties went to a surveyor to ascertain how much was included in the tract conveyed by the defendant to Jonathan F. Rose, but no inquiry was made as to the area of the entire tract. Both parties appear to have relied upon the accuracy of the map and survey made by the commissioners, and it was natural that they should have done so. By actual measurement, it appears that the contents of the farm as designated on the map are erroneous, and that its real contents, instead of one hundred and twenty-eight acres and three quarters, are about six acres less.

The first circumstance relied on as evidence of a fraudulent intent on the part of the defendant is, that in the year 1857 he advertised the farm for sale, as containing about one hundred and twenty acres. The farm was then supposed to contain about one hundred and seventeen acres. If this circumstance could have any significance as indicating an intention to defraud, it surely could indicate no intention to defraud this complainant. It appears, however, that in 1857 he mortgaged the farm to his mother, describing it as containing about one hundred and twenty acres. It was then supposed to contain one hundred and twenty-eight acres and three quarters. In 1855, after the conveyance to his brother Forman, he mortgaged the residue of the tract to him, desiring it as containing about one hundred and twenty acres. It was then supposed to contain one hundred and seventeen acres. In 1855, he advertised it for sale, as containing about one hundred and twenty acres. These circumstances show that the adjunct of quantity was used as descriptive merely, as indicating the precise contents of the farm. It affords

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evidence of a fraudulent intent, either as to the defendant or as to any other party.

The only material testimony touching the charge of fraud is that of Dr. John W. Scudder. He testifies that before the sale the defendant called on him, in company with his brother, Forman. At their request he made a rough estimate of the quantity of land contained in the lot sold by the defendant to his brother. He told them it would be more advantageous to sell by the lump, than by the acre. He adds: "I have often heard it said there were one hundred and twelve acres in the farm of defendant. I supposed the contents of the farm would be less than one hundred and twelve acres." And in answer to the question, whether he stated to defendant that his farm would not hold out one hundred and twelve acres, he answers: "I am not positive, but I think I did tell him that it would hardly hold out, if his *survey was correct.*" If this evidence is taken as literally true; if, in fact, the witness apprised the defendant prior to the contract of sale that his farm would not hold out one hundred and twelve acres, it is strong evidence in support of the charge of fraud. The witness is a gentleman of respectability, whose veracity is unquestioned. But upon the face of his testimony, there is reason to apprehend that he has fallen into a serious mistake as to the number of acres which the farm was supposed to contain. The witness states that he was called upon to calculate the quantity of land in the lot sold by the defendant to his brother, Forman. He did calculate it, and either he, or the defendant, or his brother, deducted it from the whole contents of the farm marked on the map. The map exhibited was the commissioners' map, on which the whole contents were marked as one hundred and twenty-eight acres and three quarters. The witness does not allege that he calculated the contents of the entire farm, or that he had any knowledge or suspicion of the error which exists on the commissioners' map. His conclusion was arrived at simply by deducting the number of acres in the lot conveyed by the defendant to his brother, from the quantity stated on the

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commissioners' map to be in the whole tract allotted to the defendant. That never could have shown a result less than one hundred and twelve acres. It would have shown a result less than one hundred and seventeen acres, which the tract had been supposed to contain, and it might, according to the testimony of one of the witnesses, have shown a result of a fraction of an acre less than one hundred and fifteen acres, but it never could have shown the result which Dr. Scudder supposes it did. The probability of this mistake is greatly strengthened by the statement of the witness, that he had often heard it said that the defendant's farm contained one hundred and twelve acres. Now there is not the slightest evidence in the cause, that the farm was ever supposed to contain but one hundred and twelve acres. No other witness in the cause has ever heard of it. By the commissioners' map, the farm was said to contain one hundred and twenty-eight acres and three quarters, and deducting the land estimated to have been conveyed to Forman, there remained one hundred and seventeen acres. The farm was assessed at one hundred and seventeen acres. Taxes for years were paid for that amount, and no other witness pretends that he ever heard it contained less. The farm of Forman Rose did contain about one hundred and twelve acres. That farm the witness had partially run out, and it is not improbable that the two were confounded in his mind. Aside, therefore, from any evidence on the part of the defendant, it would be safe to regard the charge of fraud as sustained by this testimony.

The answer of the defendant, and the evidence in support of it, removes all doubt upon this point. The defendant, in his answer, refers to this very interview with Dr. Scudder as evidence in his behalf. He would scarcely have referred to it if he had known, as he must have done, if the recollection of the witness of the quantity of acres supposed to be in the farm is correct—that it furnished evidence of his fraudulent conduct. Forman Rose, moreover, who was present at the conversation, testifies that nothing whatever was

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said by Dr. Scudder in regard to the farm containing less than one hundred and twelve acres. What the doctor did say was, that the farm would not hold out one hundred and seventeen acres, as had been supposed. This, I think, is the clear result of the evidence.

The second ground of relief is, that the evidence shows a case of mutual mistake, and that in equity the complainant is entitled to a deduction from the price corresponding to the deficiency in the quantity of acres specified in the deed.

The general rule, as laid down by Chancellor Kent, is, that where it appears by definite boundaries, or by words of qualification, as "more or less," or as "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case. 4 *Kent's Com.* 467; *Mann v. Pearson*, 2 *Johns. R.* 37; *Marvin v. Bennett*, 26 *Wend.* 169; *Stebbins v. Eddy*, 4 *Mason C. C. R.* 414; *Powell v. Clark*, 5 *Mass. R.* 355; 1 *Story's Eq. Jur.*, § 144, a; 2 *Washburn on Real Prop.* 630.

So where the land is sold by certain boundaries, or for so much for the entire parcel, any surplus of land over the quantity given belongs to the vendee, and the price cannot be increased or diminished on account of disagreement in measure or quantity. *Morris Canal Co. v. Emmett*, 9 *Paige* 168; *Innis v. McCrummin*, 12 *Martin's R.* 425; *Gormley v. Oakey*, 7 *Louis. R.* 452. The principle is embodied in the Louisiana Code, Art. 2471.

But where the sale is by the acre, and the statement of the quantity of acres is of the essence of the contract, the purchaser, in case of a deficiency, is entitled in equity to a corresponding deduction from the price. 1 *Sugden on Vendors* 369; *Barnes v. Gregory*, 1 *Head's R.* 230.

There is a further qualification of the general rule, *viz.* where the difference between the actual and the estimated quantity of acres of land sold in the gross, is so great as to warrant the conclusion that the parties would not have con-

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tracted had the truth been known, in such case the party injured is entitled to relief in equity on the ground of gross mistake. 1 Story's Eq., § 141; *Belknap v. Sealey*, 2 Duer 570; *Quisenel v. Woodlief*, 2 Hen. & Mun. 173, note; *Nelson v. Matthews*, *Ibid.* 164; *Harrison v. Talbott*, 2 Dana 258; *Couse v. Boyles*, 3 Green's Ch. R. 212.

The land conveyed to the complainant is described by metes and bounds. The complainant has the distinct thing for which he contracted. The complaint is, that there was an over estimate of the quantity of acres contained in the tract. It is described as containing about one hundred and fifteen acres. Its actual contents are one hundred and eight acres and eighty-eight hundredths, showing a deficiency of a fraction over six acres. The deficiency is not sufficient to warrant the interference of the court on the ground of gross mistake. No case has gone so far. There is no ground for assuming that the purchase would not have been made at the price stipulated, had the true quantity of land been known. Mr. Nickleson has not so stated. Nor has the vendor ever offered to sell his farm below the price stipulated. He has repeatedly been offered more. There was no absolute representation of the quantity of acres contained in the tract by the vendor as within his knowledge. It is expressly denied by the answer. The whole evidence of both parties shows that the representation of quantity was but an expression of belief, founded on the statement contained in the commissioners' map. The fact that the parties went together to a surveyor for a computation of the quantity sold off the farm shows that the reliance was upon the map, rather than upon any representation of the vendor. The case rests on the ground that the sale was made, not in gross, but by the acre. Assuming that the testimony of Mr. Nickleson, upon this point, is strictly true, and that so far as it conflicts with the testimony of the defendant, it is entitled to full credit, it fails to establish the fact that the sale was made by the acre. The utmost that it can be deemed to establish is, that the negotiations for the sale were conducted upon that basis. The court

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tract itself is in writing. It bears date on the seventeenth of December, 1860, more than three months before the deed was delivered. By it Rose agrees to sell, and Nickleson to buy, all that certain farm and tract of land owned and occupied by Rose, in the township of Ewing, containing about one hundred and fifteen acres, for the sum of eleven thousand five hundred dollars. There is no mistaking the import of the contract. Its terms are clear and precise. It is drawn by experienced counsel. It doubtless embodies, as it was designed to do, and as the law conclusively presumes it does, the meaning of the parties. Whatever the previous negotiations may have been, the contract eventually made was a contract for the sale of a specific tract, not by the acre but in gross, at a stipulated price for the whole farm owned and occupied by the vendor. The case is strongly analogous to that of *Stebbins v. Eddy*, 4 Mason 414, and in principle is virtually controlled and decided by it.

The bill must be dismissed.

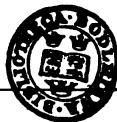
SANDERSON ROBERT vs. EDWARD F. HODGES and WILLIAM HENRY FULLER.

1. A court of equity has the power to aid a judgment creditor to reach the property of his debtor, either by removing fraudulent judgments or conveyances which obstruct the plaintiff's remedy under the judgment, or by appropriating in satisfaction thereof, rights or equitable interests of the defendant, which are not the subject of legal execution.

2. If a creditor seeks the aid of this court against the *real estate* of his debtor, he must show a *judgment at law* creating a lien on such estate; if he seeks aid in regard to the *personal estate*, he must show an *execution* giving him a legal preference or lien on the goods and chattels.

3. To reach an *equitable* interest of the debtor, the creditor must first have taken out execution at law, and have required it to be levied or returned, so as to show a failure of his remedy at law. Equity will only grant its aid to enforce legal process, when it appears that the legal remedy of the complainant is exhausted.

4. A creditor *at large*, or *before judgment* having no specific lien on his



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debtor's property, is not entitled to the interference of equity, by injunction, to prevent the debtor from disposing of his property in fraud of his creditor.

5. An *attaching* creditor, having a lien upon the property of his debtor by authority of the statute, prior to the recovery of judgment, is entitled to the aid of a court of equity to enforce his legal right.

6. If the court, where judgment is recovered, have jurisdiction of the person of the defendant, and of the subject matter of the suit, its conclusiveness cannot be questioned in the forum of another state where it is sought to be enforced.

7. A trust deed by the husband for the benefit of the wife, purporting to be given to secure certain funds received from the wife, but where no such funds were actually received by the husband, is fraudulent and void as against creditors.

8. The filing of exceptions to an answer, constitutes no technical objection to the dissolution of an injunction. The court will look into merely to ascertain whether they relate to the points of the bill upon which the injunction rests.

The complainant is an attaching creditor of Fuller, one of the defendants. The bill is filed for the benefit of himself, and of such of the other creditors of Fuller as shall come in under the attachment, and as shall contribute to the expenses of this suit. The material allegations of the bill are, that on the sixth of March, 1863, Fuller was indebted to the complainant in about the sum of \$22,140, upon judgments recovered in the Court of Common Pleas of the county of Hamilton, in the state of Ohio. That the defendant being so indebted, and being a resident of the state of Massachusetts, the complainant sued out of the Circuit Court of the county of Hudson, a writ of attachment against his estate, by virtue of which the sheriff attached fifteen lots of land lying in Jersey City, the property of the defendant. That the defendant became seized of the said land in fee simple in 1854, and continued in possession thereof up till the time of filing the bill of complaint in this cause; but in order to conceal his property, and to defraud his creditors, by a deed dated on the first of January, 1858, he conveyed the said land to Edward F. Hodges, of Massachusetts, his co-defendant, without any consideration being paid therefor, and that by

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reason of the said conveyance, the complainant is unable effectually to obtain the benefit of the said attachment, or to enforce the same against the lands attached. The bill prays, among other things, that the conveyance to Hodges may be declared fraudulent and void, as against the creditors of Fuller, and that the defendants may be restrained by injunction from aliening or encumbering the said land. Upon filing the bill a temporary injunction was issued pursuant to its prayer. The defendants having answered the bill, now ask a dissolution of the injunction:—first, on the ground that there is no equity in the bill; and secondly, because the equity of the bill, if any there be, is fully denied by the answer.

Jackson and Teese, for the defendants, in support of the motion.

Gilchrist, for complainant, contra.

Cases cited in support of the motion. *Young v. Frier*, 1 Stockt. 465; *Hunt v. Field*. *Ibid.* 36; *Melville v. Brown*, 1 Harr. 363; *Martin v. Michael*, 23 Miss. 50; *Ex parte Foster*, 2 Story 131; *Reeves v. Johnson*, 7 Halst. R. 29; *Thompson v. Eastburn*, 1 Harr. 100; *Shinn v. Zimmermann*, 3 Zab. 154; *Nix. Dig.* 45, § 66; *Edgar v. Clevenger*, 1 *Green's Ch. R.* 258; *S. C. 2 Ibid.* 259; 2 *Story's Eq. Jur.*, § 1216, b; *Neate v. Marlborough*, 3 *Mylne & C.* 407, 415; *Pullinger v. Van Emburgh*, 1 Harr. 460; *Peacock's heirs v. Wildes*, 3 *Halst. R.* 179; *N. A. Ins. Co. v. Graham*, 5 *Saulj. S. C. R.* 204; *Garwood v. Garwood*, 4 *Halst. R.* 193; *Dunham v. Cox*, 2 Stockt. 437.

Cases cited contra. *Hunt v. Field*, 1 Stockt. 36; *Williams v. Michenor*, 3 Stockt. 524; *Falconer v. Freeman*, 4 *Sandf. Ch. R.* 565; *Vreeland v. Bruen*, 1 Zab. 214; *Mohawk Bank v. Atwater*, 2 *Paige* 54; 1 Stockt. 465; *Halsted v. Davison*, 2 Stockt. 290; *Doughty v. King*, *Ibid.*

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396; *Dunham v. Cox*, *Ibid.* 437; *Edgar v. C Green's Ch. R.* 258.

THE CHANCELLOR. The question presented to ground of objection is, whether an attaching creditor judgment, is entitled to the aid of a court of equity relieving him from the operation of fraudulent judicative conveyances which obstruct the effectual operation of attachment. This point has been more than once decided by this court, after argument and upon full consideration, in *Hunt v. Field*, 1 Stockt. 36; *Williams v. Michene* 520.

The principle was adopted as early as the case *enbush v. Van Blareom*, decided by Chancellor Folsom, cited in 1 Stockt. 42, and has been, it is believed, uniformly recognized and acted on. It was upon the argument, that a principle thus recognized and adopted in practice, ought not to be disturbed upon a motion to dissolve an injunction. I still think that it is not to be regarded as an open question, and that the objection might properly be disposed of by the master or authority. It is better, even in doubtful matter, that the doctrine of *stare decisis* should be applied, and that it should be administered upon fixed and settled principles, not upon the varying or conflicting opinions of judges. If, therefore, I regarded the principle with doubt, I should be unwilling to disturb it upon this motion, or upon demurrer. But as the question has been twice urged upon the attention of the court, I have examined the question with more care than I shall otherwise deem necessary, and will briefly state the grounds upon which the doctrine of the court rests.

It is a familiar and unquestioned doctrine of equity, that the court has power to aid a *judgment* creditor in the recovery of his debt, either by removing judgments or conveyances which obstruct or impede the plaintiff's remedy under the judgment, or by ap-

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in satisfaction of the judgment, rights or equitable interests of the defendant, which are not the subject of legal execution. *Mitford's Eq. Pl.*, by *Jeremy*, 126; *Cooper's Eq. Pl.* 148.

If he seeks the aid of the court against the real estate of his debtor, he must show a judgment at law creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show, not only a judgment but also an execution, giving him a legal preference or lien on the goods and chattels. *Edgar v. Clevenger*, 1 *Green's Ch. R.* 258; *Swayze v. Swayze*, 1 *Stockt.* 273; *Young v. Frier*, *Ibid.* 465; *Wiggins v. Armstrong*, 2 *Johns. Ch. R.* 144; *Hendricks v. Robinson*, *Ibid.* 296; *Brinkerhoff v. Brown*, 4 *Johns. Ch. R.* 671, 678; *Williams v. Brown*, *Ibid.* 682; *Clarkson v. Depeyster*, 3 *Paige* 320; *Beck v. Burdett*, 1 *Paige* 305; *Harrison v. Battle*, 1 *Dev. Eq. R.* 537.

So if a judgment creditor seeks the aid of a court of equity to reach the equitable interest of his debtor in lands, or goods or chattels, he must first have taken out execution at law, and required it to be levied or returned, so as thereby to show a failure of his remedy at law. Equity will not, as of course, grant its aid to enforce legal process. It must first appear that the legal remedy of the complainant is exhausted. *Edgell v. Haywood*, 3 *Atk.* 352; *Clarkson v. Depeyster*, 3 *Paige* 320; *Cuyler v. Moreland*, 6 *Paige* 273.

It results as a necessary consequence from these principles, that a creditor at large, or before judgment, having no specific lien on his debtor's property, is not entitled to the interference of equity by injunction, to prevent the debtor from disposing of his property in fraud of his creditor. *Angell v. Draper*, 1 *Vernon* 399; *Shirley v. Watts*, 3 *Atk.* 200; *Wiggins v. Armstrong*, 2 *Johns. Ch. R.* 144; *Hendricks v. Robinson*, *Ibid.* 296; *Mitford's Eq. Pl.*, by *Jeremy*, 125; *Cooper's Eq. Pl.* 149.

Under the English statute the creditor acquires no lien upon the land of his debtor, legal or equitable, by virtue of his judgment. The judgment creditor is entitled by the

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statute to a writ of *elegit*, by virtue of which one half of the defendant's freehold lands are delivered to him to hold, till out of the rents and profits the debt is satisfied. The title he acquires is derived from the statute. He becomes "tenant by *elegit*," by virtue of the writ. His interest in the land is an "estate by *elegit*." 3 *Bl. Com.* 418; 2 *Ibid.* 161.

The effect of the proceeding under the writ is to give the creditor a legal title which he may enforce at law by ejectment. Unless the creditor sues out the writ, he neither acquires a title to, or lien upon the land, nor can he be said to have exhausted his remedy at law. Upon these grounds it has been held that a court of equity in England will not interfere to aid a judgment creditor to reach his debtor equitable interest in real estate, unless he first sue out a writ of *elegit*. *Neate v. The Duke of Marlborough*, 9 *Sim.* 63; 3 *Mylne & Craig* 407.

Upon the authority of this decision of Lord Cottenham in *Neate v. The Duke of Marlborough*, it was held by the Superior Court of New York, that a judgment creditor cannot file a bill to set aside conveyances which are alleged to be an obstruction to an execution, until such execution has been actually issued. *North Amer. Ins. Co. v. Graham*, 5 *Sandf. S. C. R.* 197.

The latter decision proceeds upon the assumption that there is a perfect analogy between an *elegit* in England, and a *f. fa.* in the state of New York. The analogy certainly does not hold between the *elegit* in England, and the *f. fa.* under the laws of this state, and the decision cannot be safely regarded as authority here.

But all the cases proceed upon the principle that the judgment creditor, in order to be entitled to the aid of a court of equity in enforcing his remedy by removing obstructions from his path, must have acquired title to, or a lien upon, the specific thing against which he seeks to enforce his judgment. He must complete his title at law before coming into equity. Unless he has established his title to, or lien upon, the prop-

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erty of his debtor, he has no right to interfere with his debtor's disposition of it. Such lien the creditor does acquire under our law by the service of the writ of attachment. The law recognizes the claim of the attaching creditor, after it has been verified by affidavit as prescribed by the statute, as a subsisting debt, for the purpose of creating the lien. Having that lien by authority of the statute, prior to the recovery of judgment, he is entitled to the aid of a court of equity to enforce his legal right. The statute, for various purposes, recognizes and enforces this right, although it may be that the claim may eventually prove to be unfounded.

The objection to the interference of a court of equity, that the claim of the attaching creditor is not ascertained, if it be entitled to any consideration, can have no application in the present case, for the plaintiff's claims against the defendant have, in fact, been established by judgment. The fact that the judgment was recovered in another state, does not impair the conclusiveness of the judgment as to the amount due. If the court, where the judgment is recovered, have jurisdiction of the person of the defendant, and of the subject matter of the suit, its conclusiveness cannot be questioned in the forum of another state where it is sought to be enforced. *Moulin v. Insurance Co.*, 4 Zab. 222.

The better opinion is, that a foreign judgment is not examinable in the courts of Westminster Hall. *2 Story's Eq. Jur.*, § 1576.

It is further urged that the injunction should be dissolved, because the equity of the bill is fully denied by the answer.

The bill charges that the lands attached are, in fact, the property of Fuller, and that they were conveyed away without consideration, to defraud his creditors. The material facts disclosed by the pleadings are, that in January, 1857, the complainant was a judgment creditor of Fuller, the defendant, to an amount exceeding \$20,000. That Fuller then was, and since 1854 had been the owner in fee, and in possession of the lands attached. That his title to said lands was kept secret, and that the deed was not recorded until the

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sixteenth of May, 1857, after he had parted with the legal title, and was sent to the clerk's office to be recorded at the same time with the deed from Fuller to Hodges. That by deed dated on the first of January, 1857, two days after the recovery of the complainant's first judgment, and twenty days before the recovery of his second judgment, Fuller conveyed the said lands to Hodges, an attorney-at-law, and the professional adviser of Fuller, without any valuable consideration whatever being paid therefor, although the deed expresses a consideration of \$22,000. That at the date of the conveyance, Hodges executed to Fuller a mortgage for \$11,050, which, together with a mortgage executed by Fuller to his grantors for \$10,950, and which continued to subsist when the land was conveyed to Hodges, would make the entire consideration of \$22,000, expressed in said deed. That the mortgage from Hodges to Fuller for \$11,050, was cancelled on the fourth of September, 1862, although Hodges never paid the said mortgage or any part thereof.

These facts are not denied by the defendants in their answers, and, unexplained, they fully sustain the charge of fraud made by the bill.

The defence is, that the conveyance made by Fuller to Hodges was in fact made in trust for the wife of Fuller, and as a security for money which he had received, or was about to receive, being the avails of lands owned by her in or near Chicago. The case, as presented by the separate answers of the defendants, is open to exception.

It does not appear that Fuller, prior to the service of the writ of attachment, had received any portion of his wife's funds. This is the corner stone of the defence, upon which the entire structure rests. For if the husband did not receive the funds of the wife, even if the conveyance was made for her benefit, it was fraudulent and void as against creditors. Hodges, to whom the conveyance was made, admits that he does not know of his own knowledge, that Fuller received funds belonging to his wife. Upon this point h

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answers, solely upon information and belief, that the husband received about the sum of \$10,000. Fuller, the husband, by his answer, sworn to on the twenty-seventh of June, 1863, says that he *hath received* funds belonging to his wife, avails of the sale of her real estate, to the sum of *at least* ten thousand dollars. This may be true, and yet every dollar of the money may have been received after the bill in this cause was filed. The answer is silent as to the *time* when the money was advanced. Hodges, in his answer, states that at the time when the mortgage was made by him, he was informed and then believed, and still believes that Fuller received of his wife's money the sum of about ten thousand dollars. This is clearly a mistake, and is in direct conflict with the answer of Fuller, and with previous statements in Hodges' own answer. Fuller, in his answer, states that his wife was about to receive certain funds arising from the sale of a portion of her lands, which she was willing should be used by Fuller, and that thereupon, on consultation, it was agreed that Hodges should take the title and give his notes and mortgage, which should be held as *security for the said funds, as the same should be received by Fuller.* Hodges himself says, that after conference between himself and Fuller, he proposed that the lands should be conveyed, and a mortgage given for the purchase money, which mortgage, and the notes secured thereby, should be held in trust for the wife when the said money should be taken by Fuller. This proposition was acted upon, and, at the request of Fuller, Hodges took the conveyance, and gave the notes and mortgage to secure the same. The statement, therefore, of Hodges, that at the time the mortgage was given he was informed, and then believed that Fuller had received of his wife's money the sum of about ten thousand dollars, must be erroneous. It is true, that afterwards the notes and mortgage were cancelled, and an arrangement made by which Hodges acted as the owner of the land, as trustee of Mrs. Fuller. But this was not the original arrangement. The trustee of Mrs. Fuller, if she was in fact the equitable owner,

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would not have given a mortgage on the land to be held in trust for herself. But she could not have been the equitable owner, for the trust under the deed, if any such was intended to be created, was utterly void, not having been manifested in writing. The answers do not show satisfactorily that ten thousand dollars, or any other sum, was advanced by the wife out of her funds, for the use of her husband, either at the time the mortgage was given, or at any other time prior to the service of the writ of attachment.

There are other circumstances connected with the transaction, as disclosed by the answers, which are open to grave observation. As already intimated, there was no written declaration or manifestation of the trust. The trust, if any, was a secret one, and so remained for years after the delivery of the title. The deed of conveyance from Fuller to Hodges is absolute upon its face. The land was purchased by Fuller of Coles, in 1854, for \$14,600. It was conveyed by Fuller to Hodges for the alleged consideration of \$22,000, subject to a mortgage of \$10,950, given by Fuller to Cole, which constituted a part of the price, and which Hodges personally assumed to pay. For the balance of the consideration, \$11,050, Hodges gave his two notes, at three and one-half years (whether with or without interest does not appear), secured by a mortgage upon the land. The notes and mortgage are given, not to the wife, for whose security they are alleged to have been given, nor to the trustee of the wife, but are made and delivered to the husband, who was to be the debtor of the wife. The whole arrangement was made by the procurement of the husband, between himself and his intimate friend and legal adviser, who became the grantee. Neither the wife herself, nor the trustee of the wife, appears to have participated in any degree in the arrangement, or to have been consulted concerning it. All this is perfectly natural and consistent, if the whole transaction was designed as a cover for the husband's property, but it seems in the highest degree improbable, that such a transaction should, under the advice of legal counsel, have been designed as a

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bona fide security for the separate estate of the wife, advanced by her or her trustee for the use of her husband. Aside from the extraordinary terms of the arrangement, viewed as a security for the debt of the husband, the utter inadequacy of the security for the purpose for which it is alleged to have been designed, is enough to cast upon the whole transaction grave suspicion, and to entitle the complainant to the benefit of a full investigation.

The answer of Fuller, moreover, admits that the mortgage given to him by Hodges, in September, 1862, nearly six years after its execution, was caused to be cancelled of record by himself, by direction of Hodges. We have, then, the admitted fact that this mortgage remained in the hands of the husband, under his legal control, nearly six years after its execution, and after its pretended assignment and delivery to the trustee of the wife as a security for his debt. The answer alleges, indeed, that it had never been assigned by recorded writing, though it was in reality assigned and delivered to Richard F. Fuller, the trustee of the wife, with the notes, on the day of its date. But was it assigned by any writing, recorded or unrecorded? Was there a legal, valid transfer, either of the notes or of the mortgage, to Richard F. Fuller, (who is admitted to be a brother of the defendant) in trust for the wife? If, in reality, he held the mortgage for the wife's benefit, why was it left in the possession, and under the control of the husband?

The subsequent contracts, alleged in the answers to have been made in regard to the land by Hodges, with the assent of the wife, do not, in my judgment, strengthen the defendant's case. They would seem to enure to the benefit of the husband rather than of the wife, and to countenance the charge that the name of the wife is used as a mere cover for the fraud of the husband. But it is unnecessary to pursue the subject further. It is not necessary, nor is it intended, to express any opinion upon the real merits of the case as it may be made to appear upon the evidence. The wife may be a *bona fide* creditor of the husband, and may be entitled

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to protection. It is enough to say that as the case now stands, the equity of the bill is not fully answered. The complainant is entitled to a full disclosure and thorough investigation of the alleged equitable interest of the wife, and of those claiming under her.

The answers do not contain such a full denial of the equity of the complainant's bill, as entitles the defendants to a dissolution of the injunction. The filing of exceptions, by our practice, constitutes no technical objection to the dissolution of the injunction. The court will look into them, merely to ascertain whether they relate to the points of the bill upon which the injunction rests. *Doe v. Roe*, 1 *Hopk.* 276; 1 *Hoffman's Ch. Pr.* 357, note 1; 1 *Barb. Ch. Pr.* 642.

The motion is denied with costs.

ELBERT L. BURNHAM and wife and others, *vs.* ROBERT
DALLING.

1. It is within the power of a court of equity to consolidate actions, with or without the consent of the complainants.
2. The order for consolidation is not of right, but is matter of discretion, and upon such terms as the court may direct.
3. Where a guardian has failed to account as required by law, and sets up a prior account as a bar to accounting in this court, and a decree for an account is made, the complainant will be allowed costs up to the decree.
4. A party in interest having died since the argument, and before the signing of the decree, the decree and orders in the cause should be signed and filed as of the date of the argument.
5. An order for that purpose is necessary.

Gilchrist, for complainants, *ex parte*.

THE CHANCELLOR. Separate bills were filed by three children of William Bale, against the defendant as their guardian, for an account. A decree was ordered in each case that the defendant should account. The court is now asked

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by the complainants to consolidate the suits. Our statute, which authorizes the consolidation of suits at law at the instance of the defendant, does not extend to suits in equity. *Nz. Dig.* 659, § 59.

Books of equity practice are silent on the subject. In *The Warden and Fellows of Manchester College v. Isherwood*, 2 *Simons* 476, sixteen bills had been filed for tithes, by the same plaintiffs against different defendants. The same defence having been set up in all the causes, a motion was made on the part of the defendants to consolidate the actions, or that one cause only might be prosecuted to a hearing, and the proceedings in the other causes stayed, the defendants undertaking to be bound by the decree in the first cause. The motion was denied, the Vice Chancellor saying that neither in the court of equity nor in the Court of Exchequer, had the practice prevailed of compelling the complainant to consolidate his different suits against several defendants. Similar decisions were made in the Court of Exchequer in the cases of *Forman v. Blake*, 7 *Price* 654, and *Foreman v. Southwood*, 8 *Price* 572. In the case of *Forman v. Blake*, Chief Baron Richards said: "I have never heard of an order, in the course of my experience, for consolidating causes in equity, nor can I conceive upon what principle it can be done."

This opinion is the more remarkable, as in the earlier case of *Keighley v. Brown*, 16 *Vesey* 344, a similar motion was made on the part of the defendants to consolidate several actions, and both Sir Samuel Romilly, by whom the motion was made, and the Chancellor (Lord Eldon) speak of the practice as a familiar one. The only question seems to have been whether it was a special application, or of course. And the next day the Lord Chancellor said he had consulted Baron Thompson of the Exchequer, who had no idea that the motion was of course, though sometimes made under special circumstances. The caution with which the Court of Chancery in England interferes with the conduct of a suit, will be found exemplified by the cases of *Cumming v. Slater*, 1 *Younge & Coll.* 484, and *Godfrey v. Maw*, *Ibid.* 485.

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Of the power of a court of equity to consolidate actions, with or without the consent of the complainant, I entertain no doubt. It seems to me to be a power over the conduct of suitors, resting upon the clearest principles, and absolutely essential to prevent scandalous abuses, and to protect defendants against gross oppression. At common law, the consolidation of suits is a recognized and familiar exercise of power. Our statute confers no new authority, but is merely declaratory of what the common law is. The common law will not endure a multiplicity of suits growing out of the same title, where the defence in all is the same. 2 *Sell. Pr.* 143; 2 *Archb. Pr.* 180.

In *Cecil v. Brigges*, 2 *T. R.* 639, where both of the causes of action might have been comprised in one, the order was made with costs.

The order for consolidation is not of right, but is matter of discretion, and upon such terms as the court may direct. *Den v. Kimble*, 4 *Halst. R.* 337; *Worley v. Glentworth*, *Halst. R.* 241.

The same reason exists for the consolidation of suits in equity as at law, though from the nature of the proceeding more caution may be required in the exercise of the power by this court.

In *The Executors of Conover v. Conover*, *Saxton* 4, though no formal application was made for consolidation, Chancellor Vroom recommended it as a measure that would save costs and delay. In that case, the bills were filed by the executors of two different estates. The complainants, in the opinion of the Chancellor, were not only at liberty to proceed as they did, by separate suits, but prudent and correct in doing so; yet, after a decree for account, he declared his conviction that great benefit would result from consolidating them, so that one investigation and report of the master, and one decree might settle both. In that case, as in this, as the suit was in reality by different complainants, there might have been serious objections to consolidating without consent. As a written consent to the order for con-

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solidation is filed in this case, there can be no difficulty on that point.

It is worthy of notice that the mode of consolidation at law, is not by uniting the several actions in one entire record. *2 Archb. Prac.* 180; *Den v. Kimble*, 4 *Halst. R.* 337; *Clason v. Church*, 1 *Johns. Cas.* 29.

The order for consolidation does not necessarily imply that.

The complainants are entitled to costs up to the decree for an account. The defendant failed to account as required by law. He set up by way of bar to accounting in this court, an account exhibited in 1853, and failed in his defence. The practice is, in similar cases, to allow the complainants costs up to the decree. *Anon. 4 Mad. R.* 273; *Beames' Costs in Eq.* 12; 3 *Daniell's Ch. Pr.* 1550; *Seaton on Decrees*, 44, 49, 206.

The wife of one of the complainants, who is a party in interest, died since the argument and before the signing of the decree. The decree and orders in the cause should be signed and filed as of the date of the argument. *Campbell v. Mesier*, 4 *Johns. Ch. R.* 334; *Vroom v. Ditmas*, 5 *Paige* 528.

An order for that purpose is necessary. 2 *Danicell's Chan. Pr.* 1219; *Seaton on Decrees*, 393, 394.

THOMPSON E. F. RANDOLPH and ROBERT J. RANDOLPH, partners, &c., vs. WILLIAM D. A. DALY and others.

1. Where the sole design of the bill is to have the individual property of one partner, alleged to have been fraudulently conveyed away by him, applied in satisfaction of a judgment against the firm, another partner from whom no discovery is sought, and against whom no relief is prayed, is neither a necessary nor a proper party.

2. A wife is a proper party to a bill filed to set aside conveyances of the husband's property made to her, or in which she has joined, and which are charged to have been voluntary and fraudulent as against creditors of the husband.

3. It is no cause of demurrer to a bill to set aside fraudulent conveyances made by a debtor, that a defendant, to whom part of the property has been conveyed, has no connection with other fraudulent transactions of the

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debtor. If the defendant is a necessary party to some part of the case as stated, he cannot object that he has no interest in other transactions constituting a part of the entire case.

4. A bill filed by an execution creditor is not demurrable for multifariousness because it seeks to set aside fraudulent conveyances, and at the same time to reach other property of the debtor, which is not the subject of execution at law, and respecting which a discovery is prayed.

5. The transactions charged, being parts of a series of acts all tending to defeat the plaintiff's remedy at law, may properly be united in the same bill.

6. A joint execution upon a judgment for a partnership debt, may be executed not only against the partnership property, but against the separate estate of each partner, for each is answerable for the whole, and not merely for his proportionate part of the debt.

7. A court of equity will protect and enforce the legal right of an execution creditor at law to levy upon the separate property of each partner of a firm.

8. To entitle an execution creditor to relief, it must appear by the bill that he has exhausted his remedy at law, and that the aid of this court necessary to enable him to obtain satisfaction of his judgment.

9. The return of the sheriff that the defendants are not, either in the partnership name or as individuals, seized or possessed of any estate, real or personal, which could be seized or taken by virtue of the execution must be taken as *prima facie* evidence of the fact, and is sufficient to give the complainants a standing in this court.

10. Certainty to a common intent is all that is ordinarily required pleadings in equity.

Slaight, for defendants, in support of the demurrer.

Winfield, for complainants, contra.

THE CHANCELLOR. To a bill filed by execution creditors of the firm of Daly & Burnet, to obtain satisfaction of the judgment out of the individual property of William D. A. Daly, one of the partners, the defendants demur.

1. Because Adolphus E. Burnet, the other partner of the firm of Daly & Burnet, is a necessary party. The sole sign of the bill is to have the individual property of D. A. Daly, one of the partners, which is alleged to have been fraudulently conveyed away by him, applied in satisfaction of

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judgment against the firm. No fraud or concealment of property is imputed to Burnet; no discovery is sought from him; no relief is needed or asked against him individually, or as a member of the firm. He is neither a necessary nor a proper party.

2. The second ground of demurrer is that the wife of Daly is not a proper party. The bill charges that the real estate in controversy was formerly owned by Daly, and was conveyed by him and his wife to a third party, and by their grantee was reconveyed to the wife, and by the wife of Daly to his father, in whom the legal title remained at the time of filing the bill. All these conveyances are charged to have been voluntary, and fraudulent as against the creditors of the husband. If fraudulent, the wife was a participant or agent in the fraud. The bill seeks to avoid, as well the title to her as the title from her. The complainants are entitled to a discovery from the wife, as well as from the husband, touching the consideration of the deeds and the alleged fraudulent purpose for which they were executed.

3. The third ground of demurrer is that the bill is multifarious as to Edward Daly, inasmuch as it unites with the charges of fraud in the conveyances to him, other charges of fraudulent concealment of property on the part of William D. A. Daly, with which Edward Daly has no concern or alleged connection. But it is well settled that on a bill to set aside fraudulent conveyances made by a debtor, and for a discovery of his property, it is no objection that a defendant, to whom a portion of the property has been conveyed, has no connection with other fraudulent transactions of the debtor. The case against the debtor is entire. If the defendant is a necessary party to some part of the case as stated, he cannot object that he has no interest in other transactions which constitute a part of the entire case. *Attorney General v. The Corp. of Poole*, 4 *Mylne & C.* 31; *Boyd v. Hoyt*, 5 *Paige* 78; *Brinkerhoff v. Brown*, 4 *Johns. Ch. R.* 671.

It is further urged that the bill is multifarious in its character as to the debtor himself, because it not only seeks

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to remove obstructions in the way of the complainants' remedy at law by setting aside fraudulent conveyances, but also seeks to reach other property of the debtor, which is not the subject of execution at law, and in regard to which a discovery is prayed. But this constitutes no ground of demurrer. The sole purpose of the bill is to obtain the aid of this court in enforcing satisfaction of the complainants' judgment, out of the property, real and personal, of the defendant, which is alleged to have been fraudulently conveyed, or to be concealed or held in trust so as to be beyond the reach of an execution at law. All the transactions charged are but parts of a series of acts, all tending to the defeat of the plaintiff's remedy at law, and may properly be united in the same bill. *Cuyler v. Moreland*, ~~Paige~~ 273.

The last two points were considered and decided in this court at the last term, in the case of *Way v. Bragaw*, ~~and~~ p. 213.

4. The fourth cause of demurrer is, that it does not appear that the complainants have exhausted the partnership effect before resorting to the separate property of *Daly*, or the firm of *Daly & Burnet* is insolvent.

It is a familiar principle that a judgment creditor must exhaust his remedy at law, before coming into equity. It is an equally familiar doctrine of equity, that as between the partners themselves, the partnership property must be applied to the payment of partnership debts, before resorting to the individual property of the partners. Yet a joint execution upon a judgment for a partnership debt may be executed not only against the partnership property, but against the separate estate of each partner, for each is answerable for the whole and not merely for his proportionate part of the debt. *Collyer on Partnership* (5th Am. ed.) 818, and note; *Herries v. Jamieson*, 5 T. R. 556; *Abbot v. Smith*, 2 W. Bl. 947.

The complainants, therefore, have a legal right, under their judgment and execution at law, to levy upon the separate property of *Daly*, and having such legal right, they are en-

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titled to the aid of this court to protect and enforce it. It is true, that as between themselves, Daly has a claim in equity against his co-partner for contribution, but this cannot impair the rights, legal or equitable, of the creditor against the property of the individual partners, for each party is clearly liable for the whole amount of the indebtedness of the firm.

It is certainly not necessary to aver that the firm is insolvent, in order to entitle the complainants to relief. The partnership property may be amply sufficient to satisfy all the debts of the firm, yet it may be so covered up, or placed beyond the reach of process, as not to be amenable to execution at law, and to render the interference of equity essential to the ends of justice. All that can be required is, that it should appear by the bill that the complainant has exhausted his remedy at law, and that the aid of this court is necessary to enable him to obtain satisfaction of his judgment. This does sufficiently appear by the bill in this cause. The complainants allege, that a writ of *fieri facias de bonis et terris* issued upon the judgment, directed and delivered to the sheriff of the county of Hudson, in which the defendants resided and transacted their mercantile business, and that the sheriff made return to the said writ, that he could not find any goods or chattels of the defendants in the said execution in his county, but had levied upon certain lands therein described, and appraised the interest of W. D. A. Daly therein at one dollar, and returned the said writ of execution wholly unsatisfied. The land thus levied upon, and the interest of William D. A. Daly in which was appraised at one dollar, is the same land which the bill alleges to have been fraudulently conveyed by Daly, to which it appears that at the time of the levy he had no legal title, and which was not, therefore, subject to a valid levy under an execution at law. The formal levy was obviously made as a foundation of a proceeding in equity. By the terms of the writ, the sheriff was commanded to levy upon all the estate, real and personal, belonging to the defendants, either as

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partners or as individuals. His return must be taken as at least *prima facie* evidence that the defendants, neither in their partnership name nor as individuals, were seized or possessed of any estate, real or personal, which could be seized or taken by virtue of the execution. This is sufficient to give the complainants a standing in this court. Certainty to a common intent is all that is ordinarily required in pleadings in equity. *Story's Eq. Pl.*, § 240, and note 3; *Cooper Eq. Pl.* 181.

The demurrer is overruled.

IN THE MATTER OF MORRIS WEIS.

1. A commission under which a party has been found an habitual drunkard, will not be superseded upon a hearing without notice, nor upon ~~up~~ *ex parte* affidavits, even with the assent of the guardian.
 2. The practice in proceedings to supersede a commission, in case of habitual drunkenness, should be substantially the same as in case of lunacy.
 3. The truth of the facts alleged in the petition may be examined either in open court or before a master. Proceeding by reference to a master adopted as the most convenient, safe, and expeditious course.
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Van Fleet, for the petitioner.

THE CHANCELLOR. Under a commission issued out of this court in the year 1854, the petitioner was found an habitual drunkard. The petitioner now asks that the commission and proceedings thereon be superseded, on the ground that he is reformed. The petition is accompanied by the affidavit of the guardian of the lunatic, and of a neighbor of the petitioner. The court is asked to order a supersedeas of the commission, upon the evidence thus presented, without a reference to a master. It is the first time, so far as I am aware, that the question has been presented, and it is proper that the practice should be settled.

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In cases of *lunacy*, under the English practice, the petition **for a supersedeas** is heard before the Chancellor in person, **without a reference**. And the commission will not be superseded without the evidence of physicians and the attendance of the lunatic in person. If the Chancellor doubts, a traverse is permitted, or an issue ordered. *Ex parte Bumpton, Moseley 78*; *Ex parte Earl Ferrars, Ibid. 332*; 1 *Collinson on Lunacy*, 324-6; 2 *Ibid. 746*; *In re Dyce Sombre, 1 Phillips 436*; *In re Gordon, 2 Phillips 242*.

In this state the practice has been, in the first instance, to refer the matter to a master for examination and report. *In the matter of Rogers, 1 Halst. Ch. R. 46*; *In the matter of Price, 4 Ibid. 533*.

Whatever course may be adopted, I am very clear that a commission ought not to be superseded upon an *ex parte* hearing without notice, and upon the evidence of affidavits merely, even with the assent of the guardian.

In re Dyce Sombre, 1 Phillips 437, Lord Chancellor Lyndhurst said: "The party is not found lunatic upon affidavits; the inquiry takes place under the commission; witnesses are examined *viva voce*, the party himself appearing and being examined by the jury. It would be extraordinary, if under such circumstances, the commission could be superseded upon the evidence of affidavits merely."

The statute indicates, and the reason of the thing requires, that the practice, in cases of habitual drunkenness, should be substantially the same as in cases of lunacy. In ordinary cases, there would seem to be less necessity in cases of habitual drunkenness, growing out of the very nature of the investigation, for the attendance of the petitioner or for the evidence of physicians. But even if these should be dispensed with, there is the greater necessity that the investigation should be conducted with care, in conformity with the ordinary practice of the court, and to guard, as far as practicable, against surprise or collusion. To require these investigations to be conducted before the Chancellor, would, in most cases, be productive of much inconvenience and expense. To per-

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mit the commission and the proceedings thereon to be superseded upon *ex parte* affidavits without investigation, would be an unwarranted and dangerous departure from the settled practice of the court in similar cases. To adopt the practice of this court in cases of lunacy, and to refer the matter to a master, will be found to be the most convenient, safe, and expeditious course. See *Matter of Hoag*, 7 Paige 312. The master will have facilities for conducting the investigation with more safety and with less expense to parties, than could ordinarily be expected in an investigation before the court. He may, if it should appear necessary or expedient, require the evidence of physicians, or the personal attendance of the petitioner. The guardian, as well as the party at whose instance the commission was sued out, or other person interested, should have an opportunity of appearing before the master, or it should satisfactorily appear that the proceeding is had with their consent.

An order of reference will be made accordingly.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1863.

THE DELAWARE AND RARITAN CANAL AND CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANIES *vs.*
THE CAMDEN AND ATLANTIC RAILROAD COMPANY, THE RARITAN AND DELAWARE BAY RAILROAD COMPANY, and others.

1. The restraining power of a court of equity is exercised for the protection of rights, the existence of which are clearly established, and so far only as may be essential for the protection of those rights.
2. The phraseology of the clause under which the exclusive privileges are claimed by the complainants, "it shall not be lawful, &c.," (*Pamph. L. 1832*, p. 80,) is the form in which the faith of the state is usually pledged, and in which contracts with corporations, touching the exercise of exclusive franchises under legislative authority, are entered into. It is none the less obligatory that it is not in *form* a contract.
3. The legislature cannot divest itself or its successors, of its sovereignty, or extinguish the trusts committed to its custody for the public welfare. It not only may, but must determine in what manner that sovereignty shall be exercised, and how those trusts shall be executed.
4. By the grant of exclusive privileges to the joint companies, the legislature in no proper sense derogated from the power of subsequent legislatures to provide highways. The legislature have the same control over their franchises and property as over those of any other citizens, and they may be taken and condemned for public use upon making just compensation.

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5. The clause in the charter of incorporation, rendering the consent of the companies necessary to legalize the construction of a competing road cannot affect the validity of the law as an act of legislation. Their assent is no part of legislation. It does not create the law, but merely avoids the constitutional objection to its validity.

6. An engagement by a contracting party that he will not do any act to the prejudice of the other contracting party, without his consent, is, effect, identical with an absolute and unqualified engagement not to do such an act.

7. By the act of 1854 (*Pamph. L. 388.*) supplementary to the act entitled "an act relative to the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Companies," the true intent and meaning of the said last mentioned act, are declared to be "fully and effectually to protect, until the first day of January, 1869, the business of said joint companies from railroad competition between the cities of New York and Philadelphia."

Held, the grant of this exclusive privilege operates only to protect the business *from city to city*, and not between intermediate places, over any and every part of the route between the said cities. The franchise is *exclusive* only in regard to passengers and merchandise transported over the entire route.

8. But even if the exclusive privilege also extend to way business, a competing route for local business is not a nuisance, unless so near the route of the complainant's road as materially to affect or take away it custom.

9. It is a well settled rule of construction that public grants are to be construed strictly; and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is that any ambiguity in the terms of the contract must operate against the corporation, in favor of the public. The corporation takes nothing that is not clearly given by the act.

10. Parties cannot affect by combination what neither can do lawfully. Nor can they affect by the agency of others, what they may not do themselves.

11. An injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal title is not put in doubt.

12. If a corporation goes beyond the powers with which the legislature has invested them, and in a mistaken exercise of those powers interferes with the rights or property of others, equity is bound to interfere by injunction if the exigency of the case require it. Whether those rights are invaded by a mistaken or a fraudulent exercise of power is immaterial.

13. The legislature cannot be presumed by a charter to intend or contemplate any grant inconsistent with, or that would operate as an invasion of, a grant already made.

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14. The powers of a court of equity in regard to nuisances, are corrective as well as preventive. It may order them to be abated, as well as restrain them from being constructed. As a general rule, such relief will not be granted unless made the subject of a special prayer.

15. To justify the issuing of an injunction to restrain the erection of a nuisance, or to abate it after it is erected, it must appear not only that the complainant's rights are clear, but that the thing sought to be enjoined is prejudicial to those rights. The fact of the nuisance must be clearly established.

16. A structure, though illegal, will not be enjoined as a nuisance, where it occasions no injury to the rights of the complainant.

17. The closing of a road used as a highway for travel, by injunction, can only be justified by the clearest necessity.

This cause was originally argued upon a motion for a preliminary injunction upon bill, answers, and affidavits.

On the 12th of August, 1862, the preliminary injunction was refused upon grounds then succinctly stated by the Chancellor.* No further proceedings were had in the cause until the 9th of June, 1863, when leave was given to the complainants to file their replication to the answers of the defendants to the original bill, and also to file a supplemental bill. On the 10th of June, 1863, the complainants filed their supplemental bill, by which, after setting out the substance of the original bill, the answers of the defendants, the taking of affidavits, and the denial of the preliminary injunction, they proceed by way of supplement, as follows:

And your orators by way of supplement show unto your honor, that notwithstanding the said declaration of the defendants in their said several answers, your orators have been informed and believe it to be true that, since the filing of the said answers and since the said hearing before your honor, the said defendants, the Raritan and Delaware Bay Railroad Company have completed their railroad from Port Monmouth to Atsion aforesaid, and, in combination with the Camden and Atlantic Railroad Company, have completed the said branch railroad from Atsion to the Camden and Atlantic

* 2 McCarter 19.

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Railroad near Jackson aforesaid, and by means of the said branch have connected the said railroads so as to form a convenient and continuous line of railway from Camden to Port Monmouth; and have made arrangements, by contract of some sort, for continuing said line by means of steamboats between Port Monmouth and the city of New York, and between Camden and Philadelphia, so as to form a complete line of travel and transportation over the said line of railroad between the said cities of New York and Philadelphia; and, in violation of their pledges, thus given as aforesaid to this honorable court in their said answers, have actually established lines of transportation, both of freight and passengers, between the said cities, over and by means of said line of railway and said steamboats—in continuation thereof—and are now actually engaged in such transportation, in open and direct violation of your orator's said chartered rights and privileges before referred to.

And your orators further show unto your honor, that they are informed and believe it to be true, that in carrying on the said business of transporting merchandise between the cities of New York and Philadelphia, the said defendants are using, and combining with other parties to use, certain names of designation for the said line of transportation, one of which names is the Importers' and Traders' Dispatch Company, under which name they keep regular offices for the reception and delivery of freight by said line at No. 2 Murray street, in the city of New York, and at pier No. 28 North river, in said city, and at Vine street wharf, in the city of Philadelphia; from which offices goods are regularly shipped over and by means of the said line of the defendants between the cities of New York and Philadelphia; and another of which names is the Union Transportation Company, under which name they keep regular offices for receiving and delivering freight at No. 136 North wharves, in the city of Philadelphia, and at pier No. 28 North river, in the city of New York, from which offices goods are regularly shipped over and by means of the said line of the defendants, between the said cities of

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New York and Philadelphia; and another of which names is the Philadelphia and Eastern Transportation Company, under which name offices are kept in said cities, and goods are regularly transported between New York and Philadelphia by land and by means of the said line of the defendants. And your orators are informed and believe that by this means, under the aforesaid names and designations, the defendants and their confederates are carrying on a large freighting and transportation business between the cities of New York and Philadelphia, over and by means of the said railroad line between Camden and Port Monmouth, and the steamboats running in regular connection therewith at either extremity of said line, amounting to more than one hundred tons of transportation per day in each direction. And your orators are also informed, and believe it to be true, that the said Raritan and Delaware Bay Railroad Company, in order to cover up and conceal the real nature of the said transportation business, have made and entered into a certain pretended contract with certain persons under the name of the said Philadelphia and Eastern Transportation Company, for the transportation of freight for said company between Camden and Port Monmouth, on certain terms in said agreement contained; and that the said railroad company pretends to be engaged in the said transportation business under and by virtue of the said agreement, and only between the said places last named; but if any such pretence shall be made by the said railroad company, and if any such contract shall be shown to have been made and entered into, your orators charge that such agreement was made with full knowledge on the part of the said Raritan and Delaware Bay Railroad Company, its officers and agents, that the business to be carried on under such agreement was to be, and was intended and understood to be, a through business between the said cities of New York and Philadelphia, or mainly such; and was also made in view of, and in connection with other arrangements or agreements for the employment of a steamboat or boats to continue and complete the said line between Port

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Monmouth and New York, and between Camden and Philadelphia; and your orators charge that such steamboat steamboats was or were the property of the officers & managers of the said railroad company, or some of them, that they, or some of them, had a large and controlling interest therein. And your orators also charge that if any such agreement or agreements was or were made, it was made under and with the express understanding that, if the said business should be interrupted or prevented by means of legal proceedings instituted in the behalf of your orators or otherwise, neither of the parties to such agreement should be liable to the other for any damages by reason thereof, and should have the privilege of abandoning the same, or some other provision with that or the like effect. And your orators expressly charge that any such agreement or contract which the said corporate defendants or either of them may have entered into in relation to the transportation of goods between Camden and Port Monmouth, was entered into by them in contemplation of and with direct reference to the employment of steamboats at either end of said line, to complete the same a line of transportation between the cities of New York and Philadelphia, and in contemplation, and with the intent forming a through line of transportation between said cities for the transportation of goods from city to city, between said cities, in direct contravention of the acknowledged rights and privileges of your orators.

And your orators further show unto your honor, that if the said corporate defendants should pretend that the said transportation business is carried on by other persons than themselves over their line of railroad, your orators charge that such be the case, it is nevertheless so done by the consent and co-operation of the said corporate defendants, and virtue of arrangements and agreements by them made with such other persons; and the said corporate defendants are responsible therefor, inasmuch as by their own showing, in a by the said answer of the Raritan and Delaware Bay Railroad Company, the said Raritan and Delaware Bay Railroad is ex-

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a public highway, and cannot be operated without the consent, and only under the direction of the said Raritan and Delaware Bay Railroad Company ; and your orators further charge that whether the said line of transportation is carried on directly by the said corporate defendants or one of them, or by other persons under contract with them, such other persons are and must be deemed as the agents of the said corporate defendants or one of them, in carrying on said business of transportation ; and your orators charge that the said corporate defendants, and also the said other persons who are aiding and assisting in carrying on the said business, are liable and chargeable therefor in the same manner and to the same extent as if the said other persons were the agents of the said corporate defendants therein, whether they are acting under a pretended contract with the said corporate defendants for the use of their railroads, or not. And your orators allege that any such contractors, if any such there be, became such with full knowledge of your orators' rights and privileges, and of the pendency of this suit, and of the allegations of the respective parties therein ; and are bound by all the equities which affect the defendants or any of them.

And your orators further show and charge, that one or more steamboats regularly ply between New York and Port Monmouth, in connection with the defendants' trains of cars running between Port Monmouth and Camden, and also one other steamboat or boats ply as ferry boats between Camden and Philadelphia, in connection with the same train of cars, so as to form regular lines of transportation for freight and passengers in both directions, and daily carrying freight and passengers through from New York to Philadelphia and from Philadelphia to New York ; and your orators charge that the said steamboats thus ply in connection with said trains of cars by the procurement of the corporate defendants or one of them ; but whether they do or not so ply by such procurement, the said corporate defendants are aiding and contributing, by such use of their line of railroad between Port Monmouth and Camden in connection with said boats, in

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establishing and carrying on a through line of transportation for freight and passengers between the said cities of New York and Philadelphia; and are thus violating the rights and privileges of your orators, and the pledges of the said defendants.

And your orators further show and charge that the said corporate defendants, in connection with their said confederates, are also engaged in the way-business by means of said line; whereby they largely compete with the railroad business of your orators, in violation of your orators' said rights and privileges, especially in the transportation by the said defendants of freight and passengers between Camden and New York, and between Philadelphia and Port Monmouth, and also between Philadelphia and Long Branch, on and over the said line of transportation so established by them as aforesaid.

And your orators further show and charge that, in carrying on their said through business, the said defendants and their confederates give carriers' tickets for freight through from city to city, between the said cities of New York and Philadelphia; but in regard to through passengers, they use various devices to avoid the appearance of ticketing a passenger through from city to city, such as requiring such passenger to pay a separate fare on the steamboat between Port Monmouth and New York, and the like; nevertheless, they do issue tickets for fare through between Camden and New York, and between Philadelphia and Port Monmouth; but notwithstanding these and such like devices, it is a well understood thing with the through passengers, that an arrangement exists by which they can go through by the entire line from one city to the other, without interruption or detention, as through passengers. And your orators charge that such arrangements are mere subterfuges to avoid, as far as possible, the appearance of open violation of your orators' rights and privileges before referred to, at the same time that the said defendants are, in law and in fact, guilty of such violation.

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And your orators state and show to your honor, that the said defendants, by thus establishing and carrying on the said line of transportation on the said railroad, and the transportation of passengers and merchandise thereby, whether by themselves or through their agents or contractors, and whether singly as sole proprietors of the entire line, or jointly in connection with other parties owning the said steamboats at either end thereof, are guilty of a direct and gross violation of the rights and privileges guaranteed to your orators in and by the second section of the act passed the second day of March, in the year eighteen hundred and thirty-two, set forth in the said original bill and herein above referred to, and in and by the first section of the act approved on the sixteenth day of March, in the year eighteen hundred and fifty-four, set forth in the said original bill (but by mistake described as approved on the fourteenth day of March, in the year aforesaid) and herein above referred to ; and a violation of the pledge given to this honorable court in and by their said answers to the said original bill.

And your orators well hoped that the said defendants, after the early and prompt notice given to them of the intention of your orators to vindicate their said rights by the filing of the said original bill before the completion of their line of railroad by way of Jackson and Atsion, notwithstanding their denial of the rights of your orators to the full extent to which your orators claimed the same in said bill, would at least have regarded and respected the rights claimed by your orators, which the said defendants, in and by their said several answers, admitted and acknowledged had been guaranteed to your orators on the part of the state of New Jersey, and which, in and by their said answers, they declared their intention to observe and respect ; and your orators also well hoped that the defendants, on further advisement, would have respected and observed all the said rights and privileges claimed by your orators under and by virtue of the said acts of the legislature ; especially inasmuch as (which your orators charge the fact to be) the said defendants, in the month of

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January or February last, appeared by their counsel before a committee of the House of Representatives of the United States, and applied for an act of the Congress of the United States that should create the said railroad line of the defendants from Port Monmouth to Camden, including the ferry between Camden and Philadelphia, and the steamboat route between Port Monmouth and New York, a post road and public highway of the United States, on the express ground alleged by the said counsel, that the said route could not, under the laws of New Jersey, be used for through travel or transportation; and that any attempt so to use the same would be enjoined by the courts of New Jersey; and they desired the said act of congress to enable them to disregard the legislation of New Jersey in this behalf.

But now so it is, may it please your honor, that the said corporate defendants, combining and confederating with the said individual defendants, who are aiding and abetting them in the premises, and with divers other persons at present unknown to your orators, but whose names when discovered your orators pray may be inserted herein and they made parties hereto, with proper and apt words to charge them, and contriving how to injure and aggrieve your orators in the premises, not only refuse so to observe your orators' just rights and privileges guaranteed to them as aforesaid, by contract with the state of New Jersey, but, having failed to obtain an act of congress as applied for by them, or any act of congress on the subject, (which, if obtained, your orators allege would have been ineffectual for the purposes of the defendants) they, the said defendants, and their confederates proceeded to engage in and carry on said business of transportation in defiance of your orators' said rights and privileges, and at the risk of being enjoined and restrained by this honorable court; but in the use and employment of various devices and contrivances before mentioned, and making various pretences, calculated and intended to cover up and conceal the real character of their said acts, and to make it appear that they were not infringing your orators'

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said rights and privileges; but either were engaged only in the alleged legitimate business of transporting freight and passengers from one interior point of New Jersey to another interior point thereof; or were permitting other and outside parties, over whom they had no control, namely, their said unknown confederates, to use their road at the alone risk and on the alone responsibility of said other and outside parties; and amongst other things, the said corporate defendants sometimes pretend to have entered into contract or contracts with the said other confederates, who, they pretend, have thereby contracted for the use of their said line of railroad from Camden to Port Monmouth, and for carrying on the said transportation business independently of said defendants; but your orators charge that if any such contract or contracts is, or are made, the same do not and cannot exonerate the defendants from their duty to regard the laws of New Jersey, and the rights of your orators under the same, and under the said guarantees before referred to; nor from so managing and controlling their works as to prevent the violation of said rights. At other times the defendants pretend that they are not, nor is either of them, the proprietor or proprietors of the steamboat or boats by which their said line is connected with, and completed to New York city, nor of the ferry boat or boats by which their said line is connected with, and completed to Philadelphia. But your orators charge that if the defendants, or some of them, are not the owners of said boats, they have, nevertheless, either by themselves, or by their agents or contractors and confederates, in some manner secured the use and employment of said steamboats so as to complete the said line from Philadelphia to New York. At other times the defendants pretend that they only transport passengers and freight to and from way stations, that is, intermediate stations in New Jersey, in connection with the cities of New York and Philadelphia respectively; and do not transport either passengers or freight through the whole route from city to city, and that they are not responsible for the manner in which the said passengers

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dispose of themselves, or in which the said freight is of, beyond such intermediate points. But your charge that, even if such pretence were true, such ~~v~~ ness, or much of it, competes with the business of you on their said railroads, contrary to the said acts of hundred and thirty-two, and eighteen hundred and ~~t~~ before referred to ; but in truth and in fact, the said ~~a~~ ants, by themselves, their agents, or contractors, do transport freight and passengers through the whole line or route from Philadelphia to New York, and ~~i~~ from New York to Philadelphia ; or, if in point of ~~s~~ do not themselves transport such freight and pa throughout the whole of said line, they do so in ~~s~~ and effect ; and they do in form, as well as in subst effect, knowingly participate in carrying on and in operation the said through line as a through line portation, and although it were true that other pa tained and kept in operation portions of said line, y defendants sustained and kept up only a single portio (the same being a known through line), the defend responsible for the part they take in the same, as ~~t~~ and contributing in the transportation of passen~~g~~ freight directly from city to city, by a railroad constr that purpose by the defendants, in violation of the ledged rights and privileges of your orators.

And your orators further charge that, if the said of transporting passengers and freight through fro city between the said cities of New York and Phil is conducted, managed, or carried on by the com of the said defendants, or of any of them, by virtu contract or contracts made by and between them said defendants, nevertheless the said defendants, at of the making of such contract or contracts, well k the said confederates obtaining such contract or con the time of the making thereof, contemplated and to establish and carry on such through lines of trans from city to city, and by entering into such contrac

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tracts with the said confederates, the defendants so contracting, knowingly and wilfully co-operated with them in the establishment of such line or lines; and your orators charge, that the said confederates, at the same time, also well knew of the rights of your orators, and of the pending of this suit, and took no rights or interests, by virtue of such contract or contracts, which placed them in any better position, or on any better footing than the said defendants occupied in relation thereto; and that the said contracts were intended merely as a cover to enable the said defendants to carry on the said transportation business ostensibly in the names of other persons, and as a means of deceiving and defrauding your orators in the premises. And your orators charge that all the said contracts and contrivances (if any such were made) were a fraud upon your orators, and intended for the purpose of enabling the defendants to evade your orators' said rights and privileges, and their own obligations in that behalf.

The prayer of the bill is that the said defendants may discover and set forth whether their said line of railroad communication has not been completed from Camden to Port Monmouth by way of Jackson and Atsion, as specified in the former pleadings in this cause; and whether said line has not been furnished with locomotive engines and cars for the transportation of passengers and freight; and whether the same has not been put in operation, and is not now in operation in the transportation of passengers and merchandise thereon; and whether a through line of transportation, both of passengers and freight, or one or the other, and which of them, from city to city, between the cities of New York and Philadelphia, has not been established over said railroad, and whether such line is not now in operation, and actually used in transporting passengers and freight through from city to city as aforesaid; and whether the said line is not conducted and carried on by the defendants, or some or one and which of them; and if not, then by whom else, and under or in pursuance of what arrangement, understanding, or agreement

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with the defendants, or some or one and which of them, setting forth the contents in full of any such agreement, if any there may be; or, if there be no through line between the said cities established and carried on by any one party or association of persons, then that they may discover and set forth the different parties or persons who maintain and carry on the several parts and portions of said line, and under what understanding or agreement the same is carried on in separate parts or portions by the several parties interested or concerned therein; and more particularly what interest the defendants, or any of them, may have in the said several portions of said line, or any or either of the said portions, whether as proprietors, lessors, lessees, contractors, contractees, or otherwise; and if there be no professed through line of transportation of passengers or freight from city to city as aforesaid, then to discover whether there is not, nevertheless, an actual line by which passengers and freight, or the one or the other, are in fact transported from city to city as aforesaid, by the transfer of such passengers or freight from one carrier to another, or in some other and what manner; and that the defendants may discover what number of passengers, and what amount of freight have respectively been transported on the said route from city to city as aforesaid; and about what number of passengers and what amount of freight are now being transported daily or weekly from city to city, at this present time; and under what designations or names the said transportation is being carried on; and what rates of fare and freight are charged for such transportation; and that the said defendants may set forth and discover all and every agreement and agreements by them, or any of them, made with any other person or persons, for the transportation of passengers or freight across said line of railroad, giving the names of the persons with whom such agreements may respectively have been made, and setting forth the said agreements in full.

And that the said defendants and each and every of them and their confederates, contractors, agents, and servants

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may be decreed to desist and refrain from further transporting, or aiding or assisting in the transportation of passengers or merchandise from city to city, between the cities of New York and Philadelphia; and that the said defendants, the Raritan and Delaware Bay Railroad Company and the Camden and Atlantic Railroad Company, and their confederates, contractors, and agents, may be severally decreed to desist and refrain from further permitting or allowing their respective railroads, engines, cars, or machinery, to be used for the purpose of carrying on any such transportation of passengers or merchandise from city to city, between the said cities, or for the purpose of aiding or assisting in the transportation of passengers or merchandise between the said cities from city to city; and that any agreements or arrangements made by them, or either of them, for that purpose, may be declared null and void; and that the said corporation defendants, their confederates, contractors, and agents, may be severally decreed to desist and refrain from forwarding, and from aiding or assisting to forward, and from permitting or allowing to be forwarded, by way of the said railroad or any part thereof, from any point or place in this state to any other point or place in this state, any passengers or merchandise which are or may be in the course of transportation from city to city, between the said cities of New York and Philadelphia; and that all the said other defendants may be severally decreed to desist and refrain from aiding and abetting the said corporate defendants, or either of them, in any such forwarding of freight or merchandise; and that by the decree of this honorable court, the defendants and each of them, together with their confederates, contractors, and agents, may be enjoined, restrained, and prohibited from doing any act or acts for, or towards, or in aid of the transportation of passengers or merchandise between New York and Philadelphia, by way of said railroad, either by using or permitting to be used the different sections thereof for that purpose, in connection with each other, or by using the said railroad or any part thereof in connec-

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tion with any steamboat or steamboats; and that the said corporation defendants may be restrained and prohibited from permitting their respective roads, or any section or sections thereof, to be used for any such last mentioned purpose; and that said defendants, respectively, and their confederates, respectively, may be enjoined and restrained from performing, aiding, or contributing to the transportation of passengers or freight from city to city aforesaid, across the said railroad, and upon steamboats running in connection therewith, by any other device or contrivance whatsoever; and that the said defendants may be severally enjoined and restrained from using the said railroad between Camden and Port Monmouth in any other manner, so as to compete in business with the railroads of your orators; and that the said corporation defendants may pay to your orators all such damages as your orators may have sustained by their unlawful acts in the premises, and that an account may be taken to ascertain the amount of said damages; and that your orators may have such other or further relief as to your honor shall seem meet, and shall be agreeable to equity and good conscience.

Affidavits and exhibits were annexed to the bill in support of its material charges. Answers were filed by all the defendants. Depositions having been taken, the cause is now heard upon the pleadings and proofs.

J. P. Stockton, for the complainants.

I shall assume as settled, the points assumed upon the former hearing, and which I do not consider as open.

1. That there is an existing and valid contract between the complainants and the state.
2. That the complainants have not, by consent, relinquished any of the rights secured by said contract.
3. That this court has jurisdiction, and is the proper tribunal to protect the complainants in the enjoyment of their franchises.

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If the complainants are seeking their rights in a proper manner by the supplemental bill, our inquiry will be confined to three points.

1. The nature and extent of complainants' franchise.
2. The fact and the manner of their disturbance.
3. The nature and kind of relief to which they are entitled.

As preliminary, I insist the complainants are properly in court by their supplemental bill. It states new facts, and asks additional relief.

The great fact charged in the original bill is, that the Raritan and Delaware Bay Railroad was being constructed to be used in violation of the chartered rights of the complainants, as a means of transportation.

The answer denied any intention to violate our rights. The defendants went further, and alleged that the road was not a public highway, and could not be used by other parties, without their consent, to violate our rights.

By our supplemental bill and proofs, we establish the fact that freight and merchandise have been carried over the roads between the cities. We ask, therefore, not only the specific relief prayed for in the supplemental bill, but such general relief as we may be entitled to.

A supplemental bill is the proper mode of bringing before the court the whole ground of complaint, and to obtain the assistance of the court, either to aid the complainants in obtaining the relief sought by the original bill, or new and additional relief. *Story's Eq. Pl.*, § 336; *Candler v. Pettit*, 1 *Paige* 168; 2 *Madd.* 405; *Elyar v. Clevenger*, 2 *Green's Ch. R.* 259, 464; *S. C. 1 Ibid.* 261; *Jones v. Jones*, 3 *Atk.* 217.

I. The nature and extent of the complainants' franchise.

The view of the Chancellor upon this point will be found in the tenth point of his opinion delivered on the former argument. 2 *McCarter* 21.

But I insist that the essential element of a competing business is a railway used for the transportation of mer-

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chandise across the state. It is a railroad or roads, and not the line of communication. It is a railroad within and across the state of New Jersey. It is a road or roads used for the purpose of transportation between the cities, not extending from city to city, but any portion of the distance between them.

The only condition to be fulfilled to bring a road within the prohibition is, that it should be used in the through transportation, no matter how it may be so employed. *Boston and Lowell R. Co. v. Salem and Lowell R. Co.*, 2 Gray 4; *Pontchartrain R. Co. v. New Orleans and Carrollton R. Co.* 11 Louisiana R. 254; *Act of 4th Feb.*, 1830, § 2, 11, 16, 23.

All that the statute could prohibit or protect was the railway across the state. They mean from water to water that is all they could mean. The railway is declared a public highway. The grant is of a road across the state. The prohibition is of roads to compete with that. *Charter of Canal Co.* (*Laws of 1830*, p. 73, 83,) § 2, 11; *Act of Feb. 3d 1831*, § 2; *Act of 2d March, 1832*, § 2; *Act of 1830*, § 24; *Act of 1831*, § 7; *Richmond R. Co. v. The Louisa R. Co.*, 1 How. 85, dissenting opinion of Curtis, J.; *Colledge v. Hart*; 6 *Welsby, Hurlst. & G.* 205.

The object of the legislature was to protect the company from railroad competition. By the act of 1854, the intent of all previous acts and legislation of the state is declared to be fully and effectually to protect the business of the companies from railroad competition between New York and Philadelphia. *Act of 1854*, § 4; *Act of 1830*, § 7, 24.

II. The fact and manner of the disturbance of the franchise.

1. The defendants' road has been used, by their own admission, to transport soldiers, horses, and munitions of war. The fact that it was done by order of the secretary of war makes it no less a violation of our franchise.

2. The affidavits annexed to the supplemental bill and the admission of the answer, show that there is in existence a line or lines of transportation, both for freight and passengers, between Philadelphia and New York, by means of th

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endants' road. And that the road is used for the transportation of passengers and freight "between the cities by lway" across the state, in whatever sense those words may be used.

3. They admit that the Philadelphia and Eastern Transportation Company have an office in the city, and carry on the business of transportation between the cities, and that they are responsible for the acts of which we complain.

4. They admit that they are directly disturbing our franchise by transporting from Camden and from Philadelphia Port Monmouth, and from Camden to New York; and in fine carries the passengers and freight over the roads between the cities.

It matters not by whose order the wrongful act was done. It is not alleged that the government have taken military possession of the road; if it were so, it would be no excuse for a third party, nor relieve them from responsibility for a violation of our rights. The government has no power, making it a post or military road, to affect our franchise. *Reesbury and Birm. R. Co. v. The London and N. W. R.*, 17 *Adol. & Ellis (N. S.)*, 669, 670.

The pleadings and evidence clearly show a direct violation of our franchise, and that the junction of the two roads is effected with that very object in view.

But it is said—

1. That it is not a competing business.

2. That the business is so insignificant as not to entitle us to the interference of the court.

The maxim "*de minimis non curat lex*" never applies to the positive and wrongful invasion of one's property. Every injury to a legal right is a wrong. *Seneca Road Co. v. Auburn R. Co.*, 5 *Hill* 170, 175; *Broom's Leg. Max.* 152, 155; *Braddock's case*, 5 *Rep.* 101, b; *King v. The Rochdale Co.*, 14 *Adol. & Ellis (N. S.)*, 136; *Washburn on Easements*, 9, 229, 569; 2 *Mach. & Gor.* 243; *Webb v. The Portland Manuf'g Co.*, 3 *Sumn.* 189, 197.

The defendants are answerable for the illegal use of their

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road made by others, because they have themselves that their road was not a public highway, and could be used by others without their consent. *Rex. v. A. Carr. & Payne* 292; *Brice v. Dorr*, 3 *McLean* 583; *Ex'rs v. Holcombe*, 4 *McLean* 310; *Hogg v. Em. How.* 607.

If they had leased both the roads, they are liable for injury done by their lessees. *Millington v. Fox, & C.* 338, 353.

They have constituted the transportation company agents to carry on this business, and are, therefore, responsible. *Story on Agency* 452; *Smith's Master and Servants* 154.

They cannot do indirectly, or by circuitous conveyances, what they cannot do directly. *York and Maryland R. Co. v. Winans*, 17 *How.* 30.

They cannot escape liability except by an act of larceny. 7 *Clark & Finnelly* 509; *Huzzy v. Field, Mees. & Ros.* 442; *Chapman v. The Mad River and Co.*, 6 *Ohio State R.* 120; *Robbins v. Hardcastle, & East* 252.

As to the effect of the lease. 13 *Gray* 128; 4 117; 44 *Maine* 362; 26 *Vt.* 717; 27 *Vt.* 370; *Re Railways* 436.

If the wrongful acts of the defendants are tolerated, the state as well as the complainants are injured. We termors; the state has the reversion. We should be liable to the state for permitting destruction of the property. We are trustees, bound to protect *cestui que trust*. *v. Norfolk R. Co.*, 5 *Gray* 170; 3 *Young & Coll.* 2; *field on Railways* 494, 411, § 179; 1 *Stockt.* 507.

If a railroad has been constructed and used, and carried passengers and freight which would otherwise have sought the complainants' road, or if they have advanced through route, and a single passenger or ton of freight has been carried over that route, they have violated

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franchise. 4 *Comyn's Dig.* "Piscary," B; 2 *Beas.* 94, 96; *Huzsey v. Field*, 2 *Cromp. Mees. & Ros.* 442.

There is no lawful purpose to which the road can be put. They have exceeded their powers. The road was illegally and fraudulently located. 9 *Harris* 126. The answers of both parties avow that they deviated from the route designated by the legislature to reach the city of Philadelphia. They are mere trespassers, acting without legal authority in the construction of their road. *Chamberlaine v. Chester R. Co.*, 1 *Welsby, Hurlst. & G.* 876, 877.

III. As to the relief to which the complainants are entitled, we ask that the nuisance be abated. It exists against law and by fraud practised on the court. The court will order it abated, or by mandatory injunction forbid it to be continued.

The court, on the former hearing, refused to enjoin the *construction* of the road, on the ground that the answers of the defendants expressly denied their intention to violate the chartered rights of the complainants. The evidence shows, notwithstanding that the road has been used in such violation, and that such was the intention of the defendants. This conduct has been a contempt of justice and an affront to the court.

The court will use its power most vigorously for the vindication of the complainants' rights. *Eand v. DeHart*, 1 *Beas.* 287; *Washburn on Easements* 578.

The court may abate as well as prevent nuisances, in clear cases. *Drewry on Inj.* 176-7, 260; 2 *Atk.* 83.

At the former hearing we were clearly entitled to an injunction to prevent the *construction* of the road, if it was intended to be used to our injury; if we had that right then, we have now the right to abate it. The court is bound to see that the defendants do not profit by their own wrong. *Croton Turnpike Road v. Ryder*, 1 *Johns. Ch. R.* 611.

We were, on filing the bill, entitled to prevent the construction of the road as the means of protection against its use. *Atkyns v. Kinnier*, 4 *Excheq.* 776; *Dendy v. Lender-*

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son, 11 *Excheq.* 192; *Tallis v. Tallis*, 1 *Ellis & Black.* 391; *Whittemore v. Cutter*, 1 *Gall.* 429; *Hall v. Bainbridge*, 5 *Adol. & Ellis*, (N. S.), 233.

Williamson, for the Raritan and Delaware Bay Railroad Company.

No great pecuniary interest is involved in the immediate result. The contest is mainly for principle.

The bill claims not only a right to the through business, but also to the intermediate business between the cities.

- 1. The defendants deny the grant of such rights as are claimed by the bill.
- 2. They insist that such grant, if made, is unconstitutional.
- 3. The prohibition extends to the *use* only, not to the construction of the road.
- 4. The location of the defendants' road was, by their charter, referred to the discretion of the directors, and cannot be interfered with.
- 5. The complainants had acquiesced in the action of the defendants, and were too late in their application for relief.

The court have already decided that the prohibition extends to the *use* only, and not to the construction of the road. As a corollary of that proposition, we insist—

- 1. That the construction of those roads, and the transportation of passengers over them, do not necessarily constitute any violation of the complainants' rights.
- 2. That the injunction ought not to be granted, mere because the road may be perverted to an illegal use.
- 3. That full protection can be given to the complainants' rights by an injunction restraining the *use* of the road.

The great object of the original bill was to restrain the ~~use~~ only. The complainants now ask more. They seek the utter destruction of the road. The original bill was filed in July, 1862. The defendants commenced running their road in August, 1862. The complainants stopped proceeding until the 9th of June, 1863, and now in December, 1863.

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seventeen months after the filing of the original bill, they seek the destruction of the defendants' road.

The object of the supplemental bill was to bring before the court facts which had occurred since the filing of the original bill. There is no further proof as to any fact in the original bill; it is confined to matter in the supplemental bill.

No one, on reading the bill or supplemental bill, would imagine that the claim of the complainants extended to local business. In the prayer of the bill, local business is not alluded to.

As to the effect of the word "between," in the charter of the complainants, it may mean either the entire distance from city to city, or any portion of said distance. 13 *How. 80*, 83, 85. We must give to it the interpretation which the legislature intended. Counsel, themselves, give different meaning to the word in different parts of the original and supplemental bills. The legislature have attached different meanings to it. *Act of 1831*, § 3; *Act of 1837*, § 3; *Act of 1842*.

It is urged that the appropriate redress is by destroying our road. Such relief could only be asked on the assumption that their construction of the law is right.

If the construction of the road is legal, it is not a nuisance.

In attempting to abate a nuisance, the court will not needlessly do injury to any one. All that will be done will be to give the complainants the relief to which they are clearly entitled, without needlessly prejudicing the interests of the defendants.

If the directors of the defendant corporations have sworn false, why should the property of the stockholders be sacrificed?

As to the extent of remedy. 9 *Paige* 575; 1 *Ibid.* 197; 1 *Gall.* 429.

But it is urged that the court should destroy the road by way of abating the nuisance, because the defendants have fraudulently located their road, not only in violation of the charter, but for the express purpose of violating the com-

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plainants' chartered rights. The complaint is that the road is not located on a direct line. The answer avers that the deviation is only a distance of four miles from a straight line between the beginning and ending points. The cases upon this point were cited upon the former argument.

The defendants admit that they approached the city of Philadelphia as near as they could consistently with their charter. The charge of fraud is utterly denied. As early as the 18th of March, 1861, they gave the complainants distinct notice of their intention. No attempt was made to interfere with the operations of the defendants until July, 1862. A party cannot lie by and permit another to expend his money on a great enterprise, and then invoke the power of the court for its destruction.

Nor can the complainants complain of the mislocation of the road. If wrong is done, let the state complain.

We have the answers of all the defendants, clear and explicit, that they selected the best route for the road authorized in their charter, so far as the character of the ground is concerned.

But suppose the road to be improperly located, how much of it is to be demolished? Will the court say where the road is to be built; where the point of intersection of the two roads shall be? Why did not complainants show where the road ought to be located, or what better point of intersection could be selected? No such remedy as is now asked for has been granted in any of the cases cited and relied upon.

As to the character and extent of the complainants' right—

The complainants insist that carrying a single passenger or a ton of merchandise on any portion of these roads, is violation of their franchise.

We insist that all the complainants are entitled to, protection from competition in the transportation of merchandise from city to city. *Act of Feb. 4th, 1830, § 24.* The language of this act admits of no doubt. *Act of Feb. 3d, 1831, § 2, supplement to Canal act; act of Feb. 4, 1831, § 6,*

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7, *supplement to Railroad charter*. Thus far specific protection is given. Nothing is said of competition.

The act of March 2d, 1832, § 2, first uses the word *compete*. The phrase is, "which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."

The word "or" may be read "and," or may be omitted. The legislature never intended to protect intermediate travel or business.

The act of March 16th, 1854, by its preamble, shows that the design of the act was to protect the company from competition in its *through* business from city to city. This act, on the face of it, is a concession by the companies to the state, which in return granted privileges to the company. By the terms of the act the legislature give construction to prior acts. The company accepted the acts, and thus assented to the legislative construction.

A competing line is a rival line. The defendants' road is not so in any sense. No amount of freight or number of passengers worthy of notice, are carried over it. A line which requires detectives to discover its freight business, and which requires a day and a half to pass from city to city, is not a competing line.

The answer states that troops were carried by order of the secretary of war. This was responsive to the bill. The road is under the control of the secretary of war.

As to the unconstitutionality of the acts under which the complainants claim their exclusive franchise. *Constitution of the U. S.*, Art. 1, § 8; *Gibbons v. Ogden*, 5 Peters' Cond. R. 562; *Ibid.* 566-7. See opinion of Johnson, J., as to the meaning of the word "*Commerce*," *Ibid.* 589; *City of New York v. Miln*, 11 Peters 104; Opinion of Story, J., *Ibid.* 154, 58, 61; 7 *How.* 401, 7, 12, 32, 64; *Corfield v. Coryell*, 4 *Washington C. C. R.* 378.

The charter of the complainants regulates the intercourse

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between the states. It declares, in effect, that no person shall travel or transport goods by way of the Delaware Bay Railroad. If this court restrain passengers or freight from going on that road, will it not be an exercise of the power to regulate commerce between the states? 1 U. S. Stat. at Large 686; 2 *Ibid.* 578, 103, ch. *XIII*, 261, § 1, 2; 3 *Ibid.* 405; 4 *Ibid.* 188; *Constitution of U. S., Art. IV, § 2*; 3 *Story's Com.* 673, ch. 40, § 1798-9; *Act of Confederation, Art. IV*; *Groves v. Slaughter*, 15 *Peters* 515-16; *Livingston v. Van Ingin*, 9 *Johns. R.* 526; *Conner v. Elliott*, 18 *How.* 591-3; *Corfield v. Coryell*, 4 *Wash. C. C. R.* 380.

Browning, for the Camden and Atlantic Railroad Company.

The privileges claimed by the complainants were conferred on the joint companies by the act of March, 1832, § 2. On the 19th of March, 1852, the Camden and Atlantic Railroad Company was incorporated with power to make a branch to Batsto. On the 3d of March, 1854, the Raritan and Delaware Bay Company were incorporated with power to construct a railroad from Raritan to Delaware bay. The route prescribed necessarily crosses the track of the Camden and Atlantic Railroad. By the act of March, 1854 (supplement to the joint companies act), their exclusive privileges were extended to 1869, with a declaration in the preamble of what they consisted. This supplement was passed after the incorporation of the defendant companies. If the supplement enlarges the rights of the joint companies, such extension cannot interfere with the corporate rights of the defendants.

In 1862, a connection was about to be formed between the Batsto branch and the Delaware Bay road at Atsion. The complainants' bill was then filed to prevent the junction of the roads. The injunction was denied. In 1863, the supplemental bill was filed to restrain the use of the road, on the ground that the use complained of is a violation of the complainants' exclusive privileges.

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Upon the motion for the preliminary injunction the court *held*—

1. That the construction of these roads is no violation of the ~~contract~~ of the state with the complainants.
2. That the connection of the roads at Atsion would be no ~~violation~~ of the contract.
3. That the defendant corporations may lawfully use the ~~connected~~ railway in carrying passengers and merchandise between any points in New Jersey.

No use which confines itself wholly to New Jersey is a competition in business with the complainants within the meaning of that contract. Through business alone is prohibited. This conclusion is fully sustained by authority. All grants to corporations, especially of exclusive privileges, are to be construed strictly, and nothing can be taken by implication. *Bridge Co. v. Hoboken L. and I. Co.*, 2 *Beas.* 81, 94. That decree was sustained on appeal.

The complainants, then, can take nothing by implication. If there be a doubt as to the extent of their privileges, they fail in their claim. *Stourbridge Canal v. Wheeley*, 2 *Barn. & Adolph.* 792; *Mohawk Bridge Co. v. Utica and Schen. R. R. Co.*, 6 *Paige* 564; *Thompson v. The N. Y. and Harlem R. Co.*, 3 *Sandf. Ch. R.* 625; *Perrine v. the Ches. Canal Co.*, 9 *How.* 192; *Charles River Bridge v. Warren Bridge*, 11 *Peters* 546; *Richmond R. Co. v. The Louisiana R. Co.* 13 *How.* 71.

The case stands now substantially as on the motion for injunction. The business of the defendants has been wholly local. Whatever else has been done has been by others, for which the defendants are in no wise responsible. It has been done either under agreement with the Philadelphia and Eastern Transportation Company, or under arrangement with the ferry company at Camden, or under authority of the secretary of war in carrying soldiers and munitions of war.

What has been done by the Eastern Transportation Company was without the knowledge of the Camden and Atlantic Company, with whom the agreement was made. It was done

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in violation of their wishes, and at the earliest possible moment it was prohibited by them; so that there is no call for the interference of this court.

The Eastern Transportation Company are not before the court. No valid decree, therefore, can be made affecting the validity of their contract.

The agreement with the ferry company was made years ago, before the Delaware Bay road was located, and with no reference to the operations of that road. It was made in good faith, and at its date was valid and legal. The only objection is that, when the connected line of railway was made, its operation was unfavorable to the complainants. The railroad company were the mere agents of the ferry company to receive and pay over the fare of the passengers. At most it affected only the fare of passengers from, or to Port Monmouth. The contract does not extend to the transportation of passengers from Port Monmouth to New York. The through tickets, which were proved to have been used, were issued by mistake, and were afterwards taken up. The only through business established by the evidence is the carrying of troops and munitions of war. This was done by request, and on the authority, of the secretary of war. The railroad company received their share only for the transit between New York and Baltimore. The answer upon this point is responsive, and must be overcome by evidence. 1 Cowen 742; 4 Paige 36 - 1 Beas. 408.

The government, during the civil war, has declared the roads of the country subject to military control. The order to carry soldiers and munitions of war was made upon these companies in connection with others.

Under an act of congress, a general order was made by the president that the railroad companies should be subject to the order of the secretary of war.

An attempt by this court to restrain the use of these roads in accordance with that order, would be a resistance to the government. A refusal by the companies to carry troops and munitions of war would be a resistance to the govern-

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ment. The defendants were not bound to inquire whether the complainants could do it or not.

Transportation for the government was not a common carrying of goods. *S. & B. R. Co. v. L. & N. W. R. Co.*, 17 *Adol. & Ellis (N. S.)*, 666.

If it be objected that the government had no power to make such order, we answer it was in obedience to the government; and even if it was an usurped power, obedience might have been compelled by armed force.

The Camden and Atlantic company have endeavored to conform to the decision of the court heretofore pronounced. Long as the defendants confine themselves to local business, and enter into no agreement for transportation from city to city, their business is lawful. They have no connection with other companies who are carrying goods, and are not responsible for the conduct of the forwarding merchants. They are simply carriers of their goods over our road. We make no inquiry as to their destination, and are under no obligation to make any. If freight is brought to our depot, through a request to carry and a tender of freight charges, it creates an obligation to carry. If the fare of passengers to New Monmouth is tendered, they are under no obligation to answer what their destination is. These companies must, by agreement among themselves, be engaged in transportation of freight or passengers from city to city, before the court lay its hands upon them. *Sandford v. Railroad Co.*, 12 *Miss. 378*; *Sharpless v. Mayor of Philadelphia*, 9 *Harris*; 6 *How.* 382.

either this court, nor the state, has the power to prohibit transportation of freight or passengers upon the Delaware, or Raritan bay. The power belongs to congress. constitution confers on congress the power to regulate commerce. *Passenger Cases*; Opinion of McLean, J., 7 399, 400; Opinion of Wayne, J., *Ibid.* 410-11; Opinion of Taney, J., dissenting, *Ibid.* 464; *State v. Wheeling Co.*, 13 *How.* 430; *Hayes v. Pacific Steamship Co.*, 596.

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Every person in the United States has the right to touch on our shores to load and unload. A necessary right for the purposes of commerce, an incident to navigation, can neither be taxed, nor prohibited by the states. As a necessary deduction, all citizens may navigate the Delaware river or Raritan bay, may receive or discharge passengers at Camden or Port Monmouth, without let or hindrance. It is a constitutional right, which can neither be hindered, fettered, or taxed. It is an individual right, pertaining to every citizen of the United States.

If individuals, in prosecution of a lawful commerce, may land passengers or merchandise at Camden or Port Monmouth, these defendants, finding them at these places on the line of their road applying to be carried, have a right to take them up and put them down anywhere along the line of their road. This would be, so far as the defendants are concerned, a local business, within the previous decision of this court.

As to the constitutionality of the act conferring exclusive franchises upon the complainants. *Sedgwick on Statute* 234; *Const. U. S., Art. IV*, § 2; *Lemon v. The People*, N. Y. Rep. 607; 3 Story's Com. 674, § 1800; *Corfield-Coryell*, 4 Wash. C. C. R. 381; 9 Harris 169; 12 Har. 378; 6 How. 382; 2 Beas. 84-7; *Const. of N. J., Art. I* § 1; *Paterson v. The Society*, 4 Zab. 395; 9 Bacon's *Ab "Statutes"* D; 1 Bl. Com. 90; 4 Seld. 491; *Vattel* 31; *Pfendorf*, p. 8, ch. 5, § 1; *Domat's Civil Law*, Book 1, tit. 1; *Locke on Gov.* 304-7; 11 Peters 466-7; Opinion of Tan J., *Ibid.* 548; 13 How. 71-7; 4 Wheat. 518; 3 *Cruikshank Dig.* (Greenl. ed.) "Franchise," tit. 27, § 29; 27 Vt. 1; *Redfield on Railways* 537, § 1, 539, § 3, 4; 2 Beas. 10 *Amer. Law Reg.* (1862) 720; 5 *McLean* 148.

Vroom, for the Raritan and Delaware Bay Railroad Company.

The court, while protecting the complainants, will not necessarily interfere with the defendants. Both parties

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rive their powers and rights from the same source, and are entitled to equal protection.

The complainants are not satisfied with the prayer of the original bill, and now ask that the defendants' road be abated as a nuisance, mainly on the ground that the conduct of the defendants has been fraudulent.

No such relief will be granted unless specially prayed for.
Story's Eq. Pl., § 42-3.

No injunction or *ne exeat* will be granted, unless specifically prayed for. The defendants might then shape their answer and evidence accordingly. Otherwise, they are deprived of this right. *Grimes v. French*, 2 Atk. 141; *Dormer v. Fortescue*, 3 *Ibid.* 124.

It is not the usual province of a court of equity to abate nuisances. Its ordinary remedy is preventive. The abating of nuisances in equity is a recent exercise of jurisdiction. 3 *Mylne & K.* 169.

The usual remedy for public nuisances is by indictment and trial by jury. Private nuisances will, in some cases, be abated. 1 *Johns. Ch. R.* 611; *Gilbert v. Wickle*, 4 *Sandf. Ch. R.* 357; 3 *Johns. Ch. R.* 282; 1 *Green's Ch. R.* 57; 1 *Paige* 197; 9 *Ibid.* 575; 2 *Story's Eq.*, § 925-7; 1 *Gall.* 429; 8 *Sim.* 193; 4 *Ibid.* 13; 2 *Atk.* 83; 2 *Anstruther* 603; 10 *Price* 378; 1 *Beas.* 280.

No precedent is found, of any such decree by a court of equity as is now asked for.

An injunction to abate a nuisance can only be granted where the erection itself constitutes a nuisance, and not where the injury grows out of the use of the erection.

A wall or dam which is itself a nuisance, will be abated. But where a house is used for offensive purposes, and the use only constitutes the injury, the house will not be destroyed to abate the nuisance.

Nor will the nuisance be abated because the defendants' conduct has been fraudulent, or because the court has been deceived or imposed upon. The order will not be made to

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operate retroactively. The jurisdiction of the court is no
punitive.

Mr. Vroom further insisted at length upon the point made by Mr. Browning, upon the non-liability of the defendants, and of the unconstitutionality of the acts conferring the exclusive privileges claimed by the complainants.

He further insisted that the act conferring the exclusive franchises was not a contract between the state and the complainants, within the meaning of the constitution. That the Dartmouth College case had carried the doctrine to its utmost length, and that many of the subsequent cases professing to be founded upon it, were not law. That roads and highways were a public necessity, and that the legislature could not deprive itself or its successors, of the power to construct and maintain them.

Bradley, for the complainants, in reply.

I shall argue the case as if no decision had been made upon the preliminary motion.

Upon the final hearing, I shall insist we are entitled to a injunction upon facts since developed alone, or upon a review of the whole case, admitting the preliminary injunction was rightfully denied. We cannot have preventive relief, but we may have what is equivalent to it; an abatement of the nuisance by an order—

1. To take up the track.
2. To suppress the lines of communication.
3. To prevent the parties from embarking in business.

The complainants have such a contract with the state as alleged in pleading, duly accepted by the complainants, and performed by them. The contract is found in the act of March 2d, 1832. The original charters and supplements with the act in question, together constitute a contract, with various terms and stipulations, between the companies and the state. The act of 1832 is but one of several acts constituting the entire contract. They have all been passed *in pari materia*, and have been fused into one complete and connected whole.

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It is said the act of 1832 is no part of the contract, because it was not a part of the original charter, and was passed after the companies were called into being. It is now, for the first time, insisted that a contract cannot be made with a corporation after it has been incorporated. It was formerly insisted that there could be no contract in the act of incorporation with a party having no legal existence, and without actual consideration. The mere acceptance of the act of 1832, and the construction of the road, is consideration enough. When that act was passed, neither canal nor railroad were finished. A large amount of expenditure was incurred, and all the loans to the companies were solicited and procured, subsequent to and upon the faith of that act. The evidence in the cause clearly establishes that fact.

It is not only the companies in their corporate capacity that are entitled to protection, but the stockholders and bond-holders as well.

The assent to the act of 1832, was filed by the stockholders of each company. In pursuance of the provisions of the act, one thousand shares were transferred to the state, and the contract was thus far executed.

That the contract is in form an *enactment*, and not in terms a *contract*, is not material. Similar language has been held to be a contract. *President, &c., v. The Trenton City Bridge Co.*, 2 Beas. 46; 2 Gray 31.

But supposing it is not a contract, but a mere law, the legislature has never repealed it, has assiduously maintained it, and repeatedly recognized it. The state does not ask the court to abate a jot or tittle of the law. So frequently has she affirmed it, that it cannot be taken to be repealed by implication, by the mere grant of the charters of the defendant corporations. It stands on the statute book unrepealed, and will avail for our protection.

But it is a *contract*. What is its scope and extent? What rights does it secure to the complainants?

It may be considered as executed and executory; as executed, it is equivalent to a grant of lands or franchises, analogo-

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gous to a grant at common law, of a market or ferry, which to a certain extent was exclusive. The king could not afterwards grant another within that limit.

We were invested with a franchise of all travel between the two cities. The original and subsequent acts all coalesce. It was an effort to subserve the public interest, to supply a great want of civilization. The grant was not only legal but wise.

The company has a right to the business within certain limits on both sides of the road. The contract, in this respect, may be regarded as *executory*.

As to the effect of a grant of a ferry or market. *Charles River Bridge v. Warren Bridge*, 7 Pick. 144; 11 Peters 619, 630, 556, 557.

The act of 1854 has not repealed the contract, nor is it a substitute for it. It denominates the previous acts contracts, but does not recall them. It confirms the act of 1832. That act says it shall not be lawful to *construct* any railroad or roads, &c.; the road is not to be built. Its language is, "which shall be *intended* or used, &c." Intended means *adapted*. That shows the intent. The defendants intended their road to be used for an illegal purpose. When the road is constructed, they say that *ex necessitate* it is subject to public uses.

It is said that "or" may be read "and," and it frequently is so, but why? There must be a reason for it.

The contract is valid. The legislature had power to make it, as well as to grant a ferry or a bridge. The state may take the franchise by right of eminent domain. They may purchase the right.

The crown has immemorially been accustomed to grant ferries or markets. Where is the limit to the power of the legislature to make such grant? It is said there is no such power granted in the constitution. The power of legislation includes it. The power of abrogation does not render the grant void. The legislature, untrammeled by constitutional limits, may enter into contracts. The constitution takes a

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from subsequent legislatures the power of repealing it, but does not limit the power of making it. To enter into such contract does not take away the power of subsequent legislatures. The constitution does that. *Vattel's Law of Nations*, Book 1, ch. 21, § 1, 6; *Sedgwick on Constitutional Law*, 25, 628; 9 *Johns. R.* 673-4; 17 *Conn.* 58; 2 *Gray* 32-4; *N. Hamp. R.* 35; 6 *Cranch* 135; *Redfield on Railways* 10.

In the *Charles River Bridge case* the power of the legislature was not questioned. It is difficult to limit the power of the legislature, or to say what it does not include. The objection, that the grant of exclusive franchises ties the hands of future legislatures, applies equally to every grant made by the legislature.

Mr. Bradley also contended that the grant was not unconstitutional, and did not discriminate in favor of the citizens of this state, and against the citizens of other states, and cited *Gibbons v. Ogden*, 9 *Wheat.* 203; *Wilson v. Blackbird Creek Marsh Co.*, 2 *Peters* 245; *People v. The Saratoga R. R. Co.*, 15 *Wend.* 131-6; *Milner v. The New Jersey R. Co.*, Justice Grier's opinion in *Newark Bridge case*; *State v. The Wheeling Bridge Co.*, 13 *How.* 518; 2 *Story's Com. on Constitution*, § 1061-4; *Sedgwick on Const. Law* 4; 19 *Wend.* 13, 55; 3 *Zab.* 429; 20 *Barb.* 68; 3 *E. D. Smith* 440, 453.

Counsel reviewed the evidence at length to show, and contended that it established, that the transportation of passengers and freight between New York and Philadelphia is carried on over the connected roads of the defendants, contrary to their disclaimer in that behalf made in their original answers, and that this is done by themselves, or through their aid and co-operation.

The answer alleges that the transportation of soldiers was done by request of the secretary of war. The defendants set up justification under authority of general government. They took order for leave to prove the fact. They were bound to prove it. The answer of a corporation under seal is no proof, nor is the answer responsive. 2 *Daniell's Ch. Pr.* 983-4, note; 1 *Beas.* 410; 2 *Johns. Ch. R.* 89.

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The defendants cannot do by piecemeal, what they can do as an entirety. 2 *Gray* 39; 11 *Louisiana R.* 257-8

The line is competing. It was designed for this very pose. The amount of business done is not material. *Atl v. Kinnier*, 4 *Excheq.* 780.

The remedy by injunction to abate the nuisance is true remedy. It is not affected by the fact that the road is completed. The defendants' acts are an invasion of a clearly ascertained right. They are of constant continuation. A constant succession of actions is required to redress the injury. If acquiesced in, their actions will ripen into a right which will injure the character of our franchise, and render it less valuable. The remedy asked is analogous to an injunction to prevent injury to patents for invention and to copyrights. 2 *Story's Eq.*, § 625-30-36-43; 2 *Eden on Inj.* (Waterman) 271-5; 4 *Johns. Ch. R.* 160; 9 *Johns. R.* 585-8; 5 *Johns. Ch. R.* 111-12; 1 *Johns. Ch. R.* 615; 17 *Conn.* 65-6. The power of the court to abate the nuisance is clear.

As to the remedy. 2 *Eden on Inj.* 388, and not *Drewry on Inj.* 260; *Redfield on Railways* 511; 2 *Story's Eq.*, § 727; *Sarton* 157, 518.

As to the prayer of the bill. We ask that the junction of the roads should be prevented. We are entitled to equitable relief conformably to that prayer. 1 *Daniell's Ch. Pr.* 4 note 1; *Story's Eq. Pl.*, § 40-1-2; *Mitford's Pl.* 38-9; 1 *v. Beach*, 1 *Beas.* 35; *Rennie v. Crombie*, *Ibid* 457; *Ba v. Burton*, 8 *Wend.* 344; *Wilkin v. Wilkin*, 1 *Johns. Ch. R.* 116-17.

The original and supplemental bills constitute a unit. They present but one case. The prayer is broad enough to cover the relief asked. *Lingan v. Henderson*, 1 *Bland's Ch.* 236.

THE CHANCELLOR. The complainants, the united Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Companies, ask to be protected in the

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joyment of certain franchises and exclusive privileges granted to them by the state of New Jersey. By their original bill, they asked that an injunction should issue to prevent the formation, by the defendants, of a continuous line of conveyance by railroad from the Delaware river to Raritan bay, by a junction of their respective roads, which might be used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business, between the said cities, with the railroads of the complainants, or that might in any manner be used, or intended to be used, for the purpose of defeating the true intent of the contracts made by the state with the complainants, to protect, until the first day of January, 1869, the business of the complainants' railroad from competition between the cities of New York and Philadelphia.

The Camden and Atlantic Railroad Company, one of the corporations which are made defendants, by virtue of their charter, granted on the 17th of March, 1852, have constructed a railroad from the city of Camden through the counties of Camden and Atlantic, a distance of about sixty miles, to the ocean at Absecon inlet, in the county of Atlantic.

The Raritan and Delaware Bay Railroad Company, the other defendant corporation, by virtue of their charter, granted on the third of March, 1854, and of the supplements thereto, were authorized to construct a railroad from some suitable point on Raritan bay, eastward of the village of Keyport, in the county of Monmouth, through the counties of Monmouth, Ocean, Burlington, Atlantic, and Cape May, to Cape Island, on the Atlantic ocean ; the general course of the route of the road, as prescribed in the charter, being nearly parallel with the line of the sea coast, and in its direct course crossing the Camden and Atlantic railroad nearly forty miles from Philadelphia. At the time of filing the complainants' bill this road was in the course of construction, and it is alleged in the bill that the company are not constructing their road on the route prescribed by their

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charter, but that the road is made to diverge ten miles to the westward of the direct route to May's Landing (one of the points in the prescribed route), to Atsion, near the extreme northwest corner of the county of Atlantic, for the purpose of approaching nearer to the city of Philadelphia, and thus forming by a branch road from Atsion to Jackson, forming a continuous and convenient railroad line to Camden, and thereby interfering with the chartered rights of the complainants. It is not suggested that the granting of the charters, or either of them, by the legislature, or that railroads constructed in accordance with the route prescribed in these acts of incorporation, constitute any violation of the contract made by the state with the complainants. But the complaint is that the junction thus illegally attempted to be formed between the roads of the defendants, much nearer to the city of Philadelphia than was contemplated or authorized by their charters, will open a communication by railroad and steamboat between the cities of New York and Philadelphia, which will compete in business with the complainants' railroad, and thereby infringe their chartered rights.

The Camden and Atlantic company, by their answer, alleged that they were authorized to construct a branch road from some convenient point on their main road, to be determined upon by the company, to Batsto, in the county of Burlington; that they located their branch railroad from Jackson station, on the main line of their road, to a point near Atsion (which branch constitutes the connecting link of the two roads of the defendants); that the terminus of the Batsto branch at Jackson is the most convenient and proper point on their railroad from which to make a branch solely for a local road; that it is the most practicable route for the said branch, so far as the topography of the country is concerned; and that the branch was so located because it was supposed that such location will best promote the interest of the stockholders and of the people of the counties through which the road passes, and will best answer the de-

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~~S~~ign of the legislature in authorizing such branch. They ~~admit~~ that an additional reason for thus locating the Batsto branch through Atsion was, that thereby a nearer and more direct communication will be opened between Batsto and the city of New York, and points in the line of the Raritan and Delaware Bay Railroad. They do not admit, nor do they deny, that the controlling reason for that location of the Batsto branch, was to aid the Raritan and Delaware Bay Railroad Company in their purpose of approaching nearer to the city, and by means of a connection with the Camden and Atlantic road, forming a continuous and convenient line to Camden.

The Raritan and Delaware Bay Railroad Company, and the president and other officers of the company, by their answer, among other things, admit that at the time of obtaining from the legislature their act of incorporation, no person interested in the application for said road, had any intention of constructing a railroad to transport passengers or merchandise between the cities of New York and Philadelphia. They admit that the road, as constructed, diverges about ten miles from the direct route to May's Landing, but say that the location by way of Atsion, as at present located, is the most feasible, expedient, and proper location for the railroad contemplated in the act of incorporation, and that the direct route from Squankum to May's Landing was surveyed by direction of the company and found to be impracticable; and that the terminus of the Batsto branch (which forms the connecting link between the two roads) at Jackson, is the most convenient and proper point on the Camden and Atlantic road, from which to make a branch solely for a local road. They deny that any agreement has been made, or is intended to be made, for the transportation of freight or passengers between the cities of New York and Philadelphia. They admit that they and the Camden and Atlantic Railroad Company have in view the construction and perfecting, by means of their respective railroads and a convenient connection between them, of a continuous and convenient line

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of railway communication across New Jersey, from the city of Camden to Port Monmouth, but they deny that they or any of them have in view the continuation of said line, either end thereof, by steamboat transportation to the cities of New York and Philadelphia, for the purpose of using the same for the transportation of passengers or merchandise in a manner which will violate any contract between the state and the complainants, or any provisions of the acts of the legislature referred to in the complainants' bill. They also deny that any contract or arrangement made by them is calculated or intended to form a continuous line of railway communication between the said cities, to compete in business with the business of the complainants, contrary to the vested rights. They admit that it is possible, if not prohibited by law, that a line of communication by railroad and steamboat between the cities of New York and Philadelphia might be opened; but they say that their railroad is not a public highway, and cannot so be used without their concurrence and consent, and as they have made no arrangement whatsoever so to use the same, and do not intend any unlawful use of their road, such use, if unlawful, cannot be made, and if attempted, can be restrained by the courts. They also deny that they intend in any way to violate the chartered rights of the complainants, or that they intend during their existence, to violate any of the alleged exclusive privileges of the complainants. And the defendants, all and each of them, declare that it is not and never has been their intention, by the construction of their railroad, or its connection with the Camden and Atlantic railroad, or otherwise, to interfere with the complainants' chartered rights, by competing with the railroad of the complainants by the transportation of passengers or merchandise between the cities of New York and Philadelphia, or otherwise.

The answers having been filed, and affidavits taken touching certain allegations in the answers, the case was heard upon a motion for a preliminary injunction as prayed for — in

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The bill to restrain the defendants from forming the proposed junction between their respective roads.

The application was denied upon grounds which were briefly assigned at the time of the decision.

On the tenth of June, 1863, the complainants filed their supplemental bill, charging that since the former hearing, the Raritan and Delaware Bay Railroad Company have completed their road from Port Monmouth to Atsion, and in combination with the Camden and Atlantic Railroad Company have completed the branch from Atsion and Jackson, and by means thereof have connected the two roads, so as to form a convenient and continuous line of railway from Camden to Port Monmouth, and have made arrangements, by contract, for continuing the line by means of steamboats between Port Monmouth and New York, and between Camden and Philadelphia, so as to form a complete line of travel and transportation over the said line of railroad between the cities of New York and Philadelphia, and have established lines of transportation, both of freight and passengers, between the said cities by means of said line, and are actually engaged in such transportation, in open and direct violation of the chartered rights and privileges of the complainants.

The defendants have answered; evidence has been taken; and the cause is now to be decided upon final hearing.

The right of an incorporated company to be protected in the enjoyment of their franchises, and the duty of a court of equity, by the exercise of its restraining power, to afford such protection, are familiar doctrines of this court. These principles have been so often declared, and are so constantly recognized in practice, as to render their re-affirmance, or citation of authorities in their support, an unnecessary formality. They are freely conceded as the recognized law of the court. The power of the court is exercised for the protection of rights, the existence of which is clearly established, and so far only as may be essential for the protection of those rights. The first subject for consideration, therefore,

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is the existence and extent of the rights for which protection is asked.

The exclusive privileges claimed by the complainants, depend mainly upon the acts of March 2d, 1832, and of March 16th, 1854. By the second section of the act of 1832, it is enacted, "that it shall not be lawful at any time during the said railroad charter to construct any other railroad or railroads in this state, without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."

By the preamble of the act of 1854, it is recited, that by reason of existing contracts between the state and the companies, as set forth in their acts of incorporation and of her acts in relation to the said companies, they are possessed of certain exclusive privileges which prevent the construction, except by their consent, of any other railroad or railroads in this state, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroads of the said companies. And by the first section of the act it is enacted, "that it shall not be lawful, before the 1st day of January, 1869, to construct any other railroad or railroads in this state, without the consent of the said joint companies, which shall be used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business between the said cities with the railroads of the said joint companies, or that may in any manner be used, or intended to be used, for the purpose of defeating the true intent of the act passed March 2d, 1832, or of this act; which intent and meaning are hereby declared to be, fully and effectually to protect, until the 1st day of January, 1869, the business of the said joint companies from railroad competition between the cities of New York and Philadelphia."

It is difficult to conceive of a more express engagement on

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The part of the state, or of a clearer recognition of the exclusive rights of the companies than is contained in these statutes. Whatever doubts may be entertained as to the construction of the contract, there can be none as to the fact of making it.

That the engagement is not in the form of a contract, renders it none the less obligatory. It is the form in which the faith of the state is usually pledged, and in which contracts with corporations, touching the exercise of exclusive franchises under legislative authority, are entered into. The same form was adopted in the grant of an exclusive franchise to the proprietors of the bridges over the rivers Passaic and Hackensack, which was recognized as a valid contract on the part of the state, both in this court and in the Court of Appeals. *2 Beas.* 81, 503.

The grant is founded upon a valuable consideration paid by the companies.

It was made as an inducement to private enterprise and private capital, to construct an important highway, required for public travel and the convenience of commerce, and which was incumbent upon the state in its sovereign capacity to provide, either directly by its own means, or through the agency of others.

Whether the grant was wise or injudicious; whether the consideration received for it was adequate or inadequate, were questions exclusively for legislative, not judicial cognizance. These considerations cannot affect the existence, or impair the obligation of the contract,

The obligations created by the act of 1832 and by other acts affecting the complainants, were recognized by the legislature in the preamble of the act of 1854, as existing contracts, conferring upon the companies exclusive privileges, which prevented the construction of competing roads, and which privileges could be extinguished only by purchase or by consent. And by the act of 1854, the legislature not only acknowledge the existence and obligation of the act of 1832, but, with the assent of the companies, they limit its

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duration, re-affirm its engagements, and declare its meaning. It would seem that every sanction which the legislature could give to its contract with the companies has been given, and that every guarantee which could be required for the quiet enjoyment of the franchises granted has been furnished. By no act of legislation, has the existence or validity of the contract been called in question. Grave questions have arisen, and different opinions have prevailed, as to the construction and effect of the contract, but so far as is known, its obligation has been by the legislature uniformly acknowledged and respected. Under such circumstances, it would certainly be a remarkable spectacle if courts of justice, whose peculiar duty it is to maintain the authority of laws and enforce the obligation of contracts, should be found denying the existence and the obligation of a contract which the contracting parties admit, and the binding force of which they acknowledge.

But it is objected that the act of 1832 is null and void, inasmuch as it derogates from the power of subsequent legislatures, upon the familiar principle that acts of parliament, derogatory from the power of subsequent parliaments, bind not. 1 Black. Com. 90.

The power of the legislature to make a contract is not denied. It is an inherent attribute of sovereignty. The constitution does not deprive the legislature of the power of contracting, but only of violating its contract. The prohibition is, that "no state shall pass any law impairing the obligation of contracts." Independent of this constitutional provision, any subsequent legislature would have as full power to annul the contract, or to pass a law inconsistent with it, as the legislature had to make it. It is the constitution then, and not the contract, that derogates from the power of subsequent legislatures.

The inability of the legislature to divest itself or its successors of its sovereignty, or to extinguish the trusts committed to its custody for the public welfare, is not questioned. But the legislature not only may, but must determine in what

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manner that sovereignty shall be exercised, and how those trusts shall be executed. It may not strip itself of the power of taxation, but it may, in the legitimate exercise of its powers, exempt the property of corporations or of individuals from taxation for a limited time, and for adequate consideration. So it may not divest itself of the power of furnishing necessary and convenient highways for public accommodation. But whether they shall be constructed directly by state officers, by means furnished from the public treasury, or by the agency of public corporations, townships, cities, or counties, by means raised by taxation, or by the agency of private corporations, by means furnished by private enterprise and capital, secured and stimulated by the hope of reward, is purely a question of legislative discretion. All these means and agencies of providing highways have been from time to time adopted, without a question as to the right of the legislature to resort to either of them. In this state great works of internal improvement, requiring large outlays of capital, have been almost universally constructed by private capital and private enterprise, aided in some instances by public bounty. Bridges, turnpikes, railroads, and canals, have been thus constructed. It has been neither the disposition of the people, nor the policy of the legislature, to incur the hazards of such enterprises, and experience elsewhere has fully demonstrated that the policy of the state, in this regard, is a wise one. If these works are entrusted to private enterprise, the inducements held out for their execution must rest in legislative discretion.

The doctrine as attempted to be applied by counsel, carried to its legitimate conclusion, would deprive the legislature of all power of disposing of public property. The sale of a part of the public domain, in one sense, derogates from the power of future legislatures. What has once been granted cannot be granted again. And yet the power of the legislature, as well as of parliament, to alienate the public domain, to convert arms of the sea, where the tide ebbs and flows, into arable land, to the utter destruction of the common

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rights of navigation and fishing, is well settled, and has been repeatedly exercised. *Gough v. Bell*, 2 *Zab.* 457 = 3 *Ibid.* 624; *Lowe v. Gorett*, 3 *Barn. & Ad.* 863; *The King v. Montague*, 4 *Barn. & Cr.* 598.

So the legislature may grant the franchise of taking tolls, which are a branch of the prerogative, upon ferries, bridges, or highways. If once granted, the same franchise cannot be granted again. The legislature cannot grant to another the right of taking tolls upon the defendants' road without making compensation. To some extent, the grant of any franchise must in this sense be derogatory of the power of a subsequent legislature. But it is not contended that the legislature has no power of granting the franchise of taking tolls, or of granting any other property which the state may own. This was not contended in the case of *The Charles River Bridge v. Warren Bridge*, 11 *Peters* 420; nor did the court so decide. What the majority of the court in that case did decide was, that where there was a grant of the franchise of a ferry without exclusive words, the legislature might lawfully establish another ferry to the detriment of the former. That the grant of the franchise being a public grant, must be construed strictly, and that nothing would pass by implication. Where no exclusive privilege was expressly granted, none would be presumed to exist.

The extent of the principle as applicable to this case, fairly stated, is simply this; that the legislature cannot divest itself of the power or the duty of providing necessary highways for public use. And the answer to the objection is, that they have not done so. The legislature have the same control over the franchises and other property of these complainants, that they have over the property of any other citizen. It is subject to the right of eminent domain. By virtue of that right, if the public necessities so require, exclusive franchises, as well as the other property of these complainants, may be taken and condemned for public use upon making just compensation. *West River Bridge Co. v. Dix*, 6 *How.* 529; *Richmond R. R. Co. v. Louisa R. R. Co.*,

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13 How. 83 ; Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40 ; Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray 1.

The legislature, therefore, have in no proper sense, by the grant of exclusive privileges to the complainants, derogated from the power of subsequent legislatures to furnish highways. The only question is, whether just compensation shall be made to the complainants for their property, or whether it may be taken and appropriated, in disregard of the honor of the state and of the rights of the complainants.

The clause in the act which renders the *consent of the companies necessary* to legalize the construction of any competing road, cannot affect the validity of the law as an act of legislation. If the clause were erased, the legal effect and construction of the contract would remain unchanged. An engagement by a contracting party, that he will not do any act to the prejudice of the other contracting party without his consent, is in effect identical with an absolute and unqualified engagement not to do the act. The party whose interests are affected may consent to the act, and thus waive his rights under the contract. It in no sense confers on these corporations legislative functions, or makes legislation subservient to their views. Their assent is no part of legislation. It does not create the law, but merely avoids the constitutional objection to its validity. It stands upon the same footing with all modifications of private charters. They are valid only when accepted by the corporation whose rights are affected.

The existence and validity of the grant of exclusive privileges by the state to the complainants, which they ask to be protected, are satisfactorily established. But an important question is raised touching the true construction of the contract, and the extent of the exclusive privileges thereby conferred. The complainants claim that by virtue of their contract they are entitled to protection from all competition, not only upon the entire route between the cities of New York and Philadelphia, but from all competition upon any

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and every part of the route; the protection extending as well to the way business as the through business between the said cities. The prohibitory clause declares that "it shall not be lawful at any time during the said railroad charter construct any other railroad or railroads in this state, without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia or to compete in business with the railroad authorized by the act to which this supplement is relative." The ambiguity the enactment is occasioned by the various senses in which the word "between" is appropriately used. It may mean *in the intermediate space*, without regard to distance, or may mean *extending or passing from city to city*. The prohibition, therefore, may be limited to the through business alone, or it may extend to transportation over any and every portion of the route. But if the design of the enactment had been to exclude all competition, that object would have been effectually attained by prohibiting the construction of any road or roads intended or used to compete with the business of the company. The clause prohibiting the construction of a road for the transportation of passengers and merchandise between the two cities would have been nugatory. But the primary design of the prohibition is indicated by declaring: first, that no road shall be constructed for the transportation of passengers or merchandise between the two cities; and then, in order to guard against any evasion of the prohibition, not to enlarge it, the second clause of the prohibition is added.

That this was the real design of the enactment will appear by reference to previous legislation on the subject. The design of the incorporation of the railroad company is stated in their charter to be, "to perfect an expeditious and complete line of communication from Philadelphia to New York;" and it is made their duty to provide suitable vessels at either extremity of their road for the transportation of passengers and produce "from city to city." The protection afforded

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the company was, that if the state should authorize any other railroad for the transportation of passengers across this state from New York to Philadelphia, which should be constructed and used, and which should commence and terminate within three miles of the commencement and termination of the roads authorized by the act, the transit duty should cease; and that if any other railroad should be constructed for the transportation of passengers between New York and Philadelphia, it should be liable to a tax not less than the amount payable to the state by this company.

The entire prohibition applies to roads constructed and used for the transportation of passengers across the state, from city to city. The whole protection afforded is to the through passenger business. It is clear that no reference is had to way business, and that no limitation was designed to be placed upon the chartering or construction of local roads.

By the act of 1831, it is enacted that when any railroad or railroads, for the transportation of passengers and property between the cities of New York and Philadelphia, across this state, shall be constructed and used for that purpose, by virtue of any law of this state or of the United States authorizing or recognizing said road, the dividends upon the stock transferred by the company pursuant to the act, should be no longer payable, and the stock should be retransferred to the company. All the protection which the company sought, all that the legislature granted, was to the business from city to city. This was the prize for which these then rival companies were struggling. It was the only object deemed worthy of competition, or worth protecting. But for this the charter would not have been asked, nor the road constructed. It was for this valuable franchise that the consideration was paid by the corporation to the state, and for this that the protection was given.

All these provisions have reference exclusively to the through business from city to city. Yet, on examination, it will be found that they were not effectual for the end designed. In terms they limited the prohibition either to a single road,

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or to a road to be constructed within a limited time, or within certain definite limits, or to a road for the transportation of passengers only. They afford protection to a particular line of road. This clearly did not fully attain the object of securing full protection against competition between the cities. The act, therefore, of 1832, which was passed after the union of the railroad and canal companies, applies the prohibition to the construction of any other *railroad or railroads anywhere* in this state, at *any time* during the continuance of the railroad charter, which should be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad of the complainants. The provisions of the acts of 1830, 1831, and 1832, are all in *pari materia*, all form parts of one entire contract, and all have in view the same general object. It cannot be said upon any sound rule of interpretation, that the legislature, by the use of a certain term, confessedly of equivocal import, appropriate to express the intent of the parties as expressed in former acts, and necessary to avoid circumlocution, have essentially enlarged the scope of the enactment and limited the power of legislation.

But how did the parties to the contract understand it?

By the act of 1854, the true intent and meaning of the act of 1832 are declared to be, "fully and effectually to protect, until the first of January, 1869, the business of the said joint companies from railway competition between the cities of New York and Philadelphia."

The plain and natural import of this language, as well as of the act of 1832, is to afford protection against competition in business from city to city. A broader interpretation requires a forced construction to be given to the use of terms employed. A contract by A that he will not engage in the forwarding or transportation business between the cities of New York and Philadelphia; or that he will enter into competition with the business of B between those cities, would not be violated in letter or spirit by A's

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gaging in the transportation of goods between Trenton and Princeton, between Camden and Haddonfield, or between Atsion and Long Branch; unless, indeed, the local business should form one link in a chain of communication reaching from city to city, and should thus be used in violation of the spirit of the contract. The language of the act of 1854 is not the language of the legislature alone, but of the companies also. Like the other acts affecting their corporate rights and privileges, it was formally accepted by the companies. Their assent was given to all its provisions. It expresses their construction of the contract. It is no violent presumption that it was approved, if not framed, by their own counsel. The act was passed more than twenty years after the act of 1832, to which it gives construction, had been in operation. The ambiguity of its phraseology could not have escaped the attention of the companies or their counsel. In 1851, the ambiguity created by the use of the word "between," had been animadverted upon, and its effect, as used in the charter of a railroad company, in a clause similar to that now under discussion, had been treated as a vexed question by the Supreme Court of the United States. *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71. They were familiar with the rule of interpretation, that, in a case of doubt, the construction of a grant must be taken most strongly against the corporation.

Under such circumstances, it is a reasonable presumption, that if the intent and meaning of the act of 1832 had been to protect against competition, not only the business between the cities, but between all intermediate places, and over any and every part of the route between the said cities, it would have been unequivocally expressed. That it was not so done, that the ambiguity was not removed when it might have been done with facility, is the strongest evidence that such was not the intention of the contracting parties.

I am of opinion that the grant of exclusive privileges made by the legislature to the complainants, operates to protect only the through business from city to city against competi-

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tion. That the companies have the franchise of taking tolls upon any and every part of the route or routes between the cities ; but that they have the *exclusive* franchise only in regard to passengers and merchandise transported over the entire route.

But if it be admitted that it is not clear that this is the true construction of the contract, and that its import is doubtful, the construction must still be against the complainants. It is a well settled rule of construction that public grants are to be construed strictly ; and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is, that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public. The corporation take nothing that is not clearly given by the act. *Proprietors of Stourbridge Canal v. Wheeley*, 2 Barn. & Ad. 793 ; *Beaty v. Lessee of Knowler*, 4 Peters 168 ; *Prov. Bank v. Billings*, 4 Peters 514 ; *United States v. Arredondo*, 6 Peters 738 ; *Charles River Bridge v. Warren Bridge*, 11 Peters 420 ; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 81 ; *Proprietors of Bridges v. Hoboken Land Co.*, 2 Beas. 81.

There is another view of this part of the case which appears to me to be decisive of the rights of these parties, so far as the way business is concerned.

If the grant of exclusive privileges to the companies extend to the way business as well as to the business from city to city, it must, nevertheless, receive a reasonable interpretation. It must be restricted within such limits as may be fairly deemed to have been within the contemplation of the contracting parties, and as shall appear to be in accordance with the reason and spirit of the grant.

It was a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near as to draw away its custom, it was a nuisance. The same principle applies to any exclusive privilege created by statute. The grant must be construed so as to give it due effect excluding contiguous and injurious competition. The com-

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peting route for local business must be so near the route of the complainants' road as materially to affect or take away its custom. *Ogden v. Gibbons*, 4 Johns. Ch. R. 160; *Newburgh Turnpike Co. v. Miller*, 5 Ibid. 112.

If, therefore, the grant could be so construed as to protect the grantees against the construction of any railroad in the immediate vicinity of their route, and against competition in local or way business upon that route, it would not give to the complainants the monopoly of all local business however remote, which, for want of railroad accommodations upon the natural and direct routes of travel and intercourse, might be driven by inconvenient and circuitous routes to seek its destination over the complainants road. The grant of the exclusive franchise of having a railroad, and of carrying passengers and freight between Camden and Amboy, cannot confer a monopoly of the business between Camden and Manchester, or Toms River. The local business upon the two roads cannot be regarded as a competing business.

The right of the complainants to be protected in the exclusive enjoyment of their franchise of taking tolls upon their roads for through business being established, are the acts of the defendants in violation of those rights?

The application for a preliminary injunction to restrain the connection between the defendants' roads, was denied on the 12th of August, 1862. The junction was formed, and the roads thus united went into operation in September, 1862. The route is continued by means of steamboats between Port Monmouth and New York and between Camden and Philadelphia, which run in connection with the road, so as to form a complete and uninterrupted line of travel and transportation over the roads, between the cities of New York and Philadelphia. In eleven months, commencing with November, 1862, there were transported over these roads, between Camden and Port Monmouth, and mainly between the cities of New York and Philadelphia, 14,000 tons of freight and 17,600 passengers. A small portion of the freight consisted of munitions of war, and nearly the whole of the passengers were soldiers, car-

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ried over the road for the United States government. The transporting of merchandise from city to city, is carried on by the agency of transportation companies, who have established offices for the reception and delivery of freight in each city, from which offices goods are regularly shipped over the entire route. Daily regular freight lines are thus established. The route is advertised, the attention of merchants and shippers is directed to it as a new and expeditious route, and their patronage solicited. The business of transporting way freight and passengers, is conducted by the railroad companies in their own names. Ordinarily, through tickets are not furnished, and freight is advertised to be carried between Camden and Port Monmouth only. But arrangements are made, and information furnished, which enable passengers to pass from city to city without interruption, and both passengers and through freight reach the cities from the termini of the roads by the same boats which accommodate the way travel, and which are provided by the companies for the accommodation of the regular lines upon their respective roads.

The through freight over the roads has been chiefly transported by the Philadelphia and Eastern Transportation Company, under an agreement bearing date on the 20th of December, 1862, entered into between them and the Raritan and Delaware Bay Railroad Company, by which the railroad company agree to transport over the roads, for the space of ten years, at stipulated rates, all the merchandise and freight of every description delivered to them by the transportation company, and that the entire business of transporting freight over the roads between Camden and Port Monmouth, should be enjoyed and transacted for the benefit of the transportation company, excepting the way freight, the traffic in coal, and the business received from the Pennsylvania Railroad Company, the control of which the railroad company reserve to themselves. The transportation company is constituted the exclusive agent of the railroad company, with power at their expense, to contract for the transportation of freight over the line from Camden to Port Monmouth; and the trans-

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station company agree to exert their utmost influence to secure freight for the line, and to furnish for transportation, or said line of railway exclusively, all the freight of whatever kind or description which they may or can receive, control, or influence for transportation, into, through, across, beyond the state of New Jersey.

By an agreement entered into on the 25th day of October, 31, between the Camden and Atlantic company and the Raritan and Delaware Bay company, it was, among other things, stipulated that the Camden and Atlantic company would construct without delay the Batsto branch of their railroad. That the Raritan and Delaware Bay company would furnish the means, control the construction, designate a point of termination on their road, and determine the cost of the work. That the Camden and Atlantic company would transport, or allow the Raritan and Delaware Bay company to transport, in connection with their road, all locomotives, cars, passengers, and freight that may be delivered to them by the Raritan and Delaware Bay company, over their road and branches, between the points of intersection of the termini of their road, and should procure staunch and commodious ferry boats to be used at the termini of their road and branches on the Delaware, and convey promptly to and from Philadelphia and the termini of their road at Camden and elsewhere on the Delaware, all such freight, passengers, and cars as the Raritan and Delaware Bay company would require. That the number of trains, the times of running, the rate of speed, the charges for freight, and the rates of fare, should be regulated by the Raritan and Delaware Bay company. That if the Camden and Atlantic company failed to perform any part of their agreement, the Raritan and Delaware Bay company were authorized to perform it at the cost of the defaulting party.

It was further mutually agreed between the contracting parties, that if legal proceedings were instituted, calling in question the right of either or both parties to carry out the contract in whole or part, each party will use every effort

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promptly and in good faith to defend itself and each other, will employ the best counsel, and use the utmost diligence to defend itself or themselves, against all claims, suits, or interference; that all suits at law or in equity shall be carried to the court of last resort; and that all expenses of litigation shall be borne by the parties in a designated proportion. That the Camden and Atlantic company would form no connection with any other corporation or individuals, for the conveyance of passengers or merchandise by railroad to or from Raritan bay, nor make any connection with any other intersecting railroad, between the junction of the two railroads and the termini of the Camden and Atlantic company on the Delaware, north of the Atlantic road; and that the Raritan and Delaware Bay company will make no connections with any road or roads that either directly, or by connection, run to the Delaware river, north of Camden; and that the agreement should extend and be binding on the parties, for thirty years from the completion of the Raritan and Delaware Bay Railroad and the branches of the Camden and Atlantic Railroad.

By the supplemental agreement of the 16th of February, 1862, the Camden and Atlantic company agreed that, if the agreement of the 25th of October, 1861, shall not be carried out in good faith, the Raritan and Delaware Bay company shall have a right to take possession of and manage the Camden and Atlantic road, so as effectually to carry out the purpose of that agreement, and they, and such persons as they might substitute, were constituted the attorneys, irrevocable, of the Camden and Atlantic company for that purpose; and they empowered the attorney, or their substitute, to consent to a decree for the specific performance of the agreement, giving to the Raritan and Delaware Bay company, the management and operations of such portion of the Camden and Atlantic road, and of the ferries in connection therewith, as might be required for that purpose.

By the agreement of the 20th of December, 1862, between the Raritan and Delaware Bay company and the Philadelphia

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phia and Eastern Transportation Company, it was stipulated that these agreements between the railroad companies should be held by designated agents, for the benefit of the transportation company, by whose agency the through business over the line is carried on.

The real character and design of these contracts cannot be mistaken. So far as the rights of the complainants are concerned, their character cannot be altered by the fact, that in terms the transportation is limited to the line of the road. Taken in connection with the other evidence in the cause, they are obviously designed to promote the formation of a through route for the transportation of merchandise between the cities of New York and Philadelphia. Neither company has a right to permit its road to be used for such purpose. They cannot effect by combination, what neither can do lawfully. Nor can they effect by the agency of others, what they may not do for themselves. The companies control not only the railroad line across the state, but the boats at either terminus upon the Raritan bay and the Delaware. The Camden and Atlantic company are under stipulation to furnish boats upon the Delaware. The boats upon the Raritan Bay are owned in whole or in part by officers of the company, and are used in connection with the regular daily lines upon the road. The evidence shows that arrangements have been entered into, with direct reference to the formation of a continuous line of transportation between the cities of New York and Philadelphia, and that the transportation of freight and passengers from city to city, is carried on over the defendants' roads by their co-operation, with their knowledge, and under and by virtue of agreements entered into between themselves and with others. The fact is clearly established, that the railroads of the defendants are used for the transportation of passengers and merchandise between the cities of New York and Philadelphia, and are competing in that business with the roads of the complainants, in direct violation of the engagement made by the state, and of the rights and privileges of the complainants.

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The only remaining inquiry is, to what relief are the complainants entitled?

An injunction is the proper remedy to secure to a party the enjoyment of a statute privilege of which he is in the actual possession, and when his legal title is not put in doubt. *Livingston v. Van Ingen*, 9 Johns. R. 506; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. R. 615.

And if corporations go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the rights of property of others, equity is bound to interfere by injunction, if the exigency of the case require it. *Agar v. Regent's Canal Co.*, *Cooper's R.* 77 = *River Dun Nav. Co. v. North Midland Railway Co.*, 1 *Railway Cas.* 154; *Bonaparte v. Camden and Amboy R. R. Co.* — *Baldwin's R.* 231; *Scudder v. The Trenton Delaware Fall Co.*, *Saxton* 694.

The complainants' rights are clear and unquestioned. They have been in the actual enjoyment of their franchise for more than thirty years. The defendants, by using, or permitting their roads to be used, for the establishment of a through route for the transportation of freight and passengers between the cities of New York and Philadelphia, have exceeded the powers conferred upon them, and interfered with the rights and the property of the complainants. There is nothing in the charters of the defendant corporations, or of either of them, which expressly, or by implication, confers the power of establishing such route, or the franchise of taking tolls thereon. The legislature cannot be presumed to have intended or contemplated any grant, inconsistent with the manifest design of the charters of the complainants. Whether the complainants' rights have been invaded by mistake, or a fraudulent exercise of power, is immaterial. In either event, they are entitled to have their rights protected and the wrong suppressed. The complainants are entitled to an injunction restraining the defendants from using, or permitting to be used, their roads, or either of them, for the

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purpose complained of, pursuant to the prayer of the supplemental bill.

The original bill in this cause was filed before the connection between the defendants' roads had been formed, and sought to enjoin the completion of the work. The connection having been formed, and the roads used for an unauthorized purpose, in violation of the complainants' rights, it is now insisted that the roads, as constructed and used, are an existing nuisance, which should be ordered to be abated, and that the defendants should pay to the complainants the damages sustained by their unlawful acts in the premises.

The powers of a court of equity in regard to nuisances, are corrective as well as preventive. It may order them to be abated, as well as restrain them from being erected. *State of Penn. v. Wheeling Bridge Co.*, 13 How. 519; *Van Bergen v. Van Bergen*, 2 Johns. Ch. R. 272; *Hammond v. Fuller*, 1 Paige 197; *Earl v. De Hart*, 1 Beas. 280; *Washburn on Easements* 578.

In *Earl v. De Hart*, Chancellor Williamson said: "There is no reason why the court should not exercise a power to abate, as well as prevent the erection of nuisances, in clear cases." The nuisance in that case was ordered to be abated, and the decree of the Chancellor was affirmed by the unanimous opinion of the Court of Appeals. In the case of *The State of Pennsylvania v. The Wheeling Bridg Co.*, 13 How. 519, before the Supreme Court of the United States, the bill was filed to enjoin the erection of a nuisance. The bridge was completed after the bill was filed. The court said, the defendants having had notice of an application for an injunction, before the defendants had thrown any obstructions over the river, they cannot claim that their position is strengthened by the completion of the bridge. The bridge was ordered to be abated as a nuisance to the rights of the complainant.

Relief in this form is not asked for, either in the original or supplemental bill. As a general rule, such relief will not

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be granted unless made the subject of a special prayer. *Story's Eq. Pl.* 43. But this objection may, perhaps, be regarded as too formal to interfere with substantial equity.

The bill seeks to restrain the defendants from making any connection between their roads, so as to form a continuous line by railroad from the Delaware to the Raritan, which might be used for the purpose of defeating the true intent of the contract made by the state with the complainants; and also to restrain the Raritan and Delaware Bay company from further constructing their road on the line to Atsion, on any line deviating materially to the west of a direct route from Squankum to May's Landing.

The application is based upon two distinct grounds, *viz.*

1st. Because the divergence of the Raritan and Delaware Bay road to Atsion from the line of the direct route to Carteret, May, by way of May's Landing, was an unauthorized and fraudulent deviation from the route prescribed by the charterer. And 2d. Because the roads, as united, were intended to be used in violation of the complainants' rights, for the transportation of passengers and merchandise between the cities of New York and Philadelphia.

In order to justify the issuing of an injunction to restrain the erection of a nuisance, or to abate it after it is erected, it must appear, not only that the complainants' rights are clear, but that the thing sought to be enjoined is prejudicial to those rights. The fact of the nuisance must be clearly established. *Mohawk Bridge Co. v. Utica and Schenect. R. Co.*, 6 Paige 554. So far as the complainants are concerned the erection complained of is no nuisance, however unlawful unless it occasion injury to them. The ground of relief thus stated by Mr. Justice Baldwin: "If the complainants' rights of property are about to be destroyed without authority of law, or if lawless danger impends over them by persons acting under color of law, when the law gives them no power or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party con-

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mitting it to damages in a court of law for a trespass, a court of equity will enjoin its commission. So of any act of peculiar trespass, occasioning grievous mischief or lasting injury, destructive of property, a right, or franchise." *Bonaparte v. Camden and Amboy R. R. Co.*, *Baldwin's R.* 231.

The construction of a railroad over the land of a complainant, without lawful authority, will be enjoined as a nuisance. It is a permanent appropriation of the land of the complainant, and an irreparable injury to his freehold. So if a bridge be erected without lawful authority across a navigable river, to the prejudice of the rights of navigation, the structure itself is a nuisance, and will be abated at the instance of a party injured. But the defendants' roads are not erected upon the lands of the complainants; they do not obstruct their right of way; they destroy no right or franchise of the complainants, which would subject the defendants to damages at law. How, then, do they constitute a nuisance, or entitle the complainants to a remedy by injunction? It is not the structure, but the use of the roads in violation of the complainants' franchise, which creates the nuisance.

The road having been constructed, even if unauthorized, it cannot be abated as a nuisance, as it occasions no injury to the complainants. If there be any room for doubt whether the location of the defendants' road to Atsion is authorized by the charter, an order to abate it would occasion certain loss and injury to the defendants, without any corresponding benefit to the complainants. An injunction to restrain the use of the roads, as prayed for in the complainants' bill, is, under the circumstances, the only appropriate remedy.

Relief in this form is sanctioned by authority and precedent. *Boston and Lowell R. Co. v. Salem and Lowell R. Co.*, 2 *Gray* 1; *Pontchartrain R. Co. v. New Orleans and Carrollton R. Co.*, 11 *Louisiana An. R.* 253.

The closing of a road used as a highway for travel, by injunction, could only be justified by the clearest necessity.

It will be referred to a master, to take an account of all the through passengers and freight which have been carried

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over the road since the opening of the route; and also _____ damages which the complainants have sustained thereby. _____ taking the account, the master will include all the soldie _____ horses, baggage, and munitions of war that have been tra_____ ported, distinguishing this part of the account from ordina_____ business.

No proof has been offered in support of the allegation the answer, that they were carried over the roads of the _____ defendants by order of the secretary of war, or by orders the general government. Should it appear before the mas_____ that any such orders were made, he will report the eviden_____ thereon, and the disposition of that part of the case will reserved till the coming in of the report.

DAVID HOPPER vs. THE EXECUTORS OF JOHN MALLESON and others.

1. The power to sell land for the payment of taxes, is a naked pow_____ not coupled with an interest, and must be exercised in strict accorda_____ with the provisions of the statute. Every prerequisite to the exercise the power must precede it.
2. To establish a title under a sale for taxes, it is incumbent on the p_____ chaser to show that all the prerequisites to the exercise of the power of _____ have been complied with. The deed is not even *prima facie* evidence _____ of that fact.
3. It is essential to the validity of a sale of land, under the "act to m_____ taxes a lien on real estate in the county of Passaic, and to authorize the sale of the same for the payment thereof," (*Pamph. L.*, 1852, p. 247,) _____ that it should appear that the tax was assessed on account of the property s_____ old.
4. The recital of the tax warrant, "whereas it appears to the mayor and aldermen of the city of Paterson, that an assessment of four dollars and fifty cents of taxes, &c," is not legal evidence of the fact of an assessm_____ ent, nor of demand of payment.
5. The assessment itself is the only competent and legal evidence o_____f the fact of an assessment.
6. Where the tax warrant directs a sale to be made to raise a sum l_____ rger than the whole amount due, it is a clear excess of authority, and rende_____s the warrant, so far as it affects the land in question, null and void.

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7. Even if all the requirements of the statute had been strictly complied with, so as to confer upon the purchaser at such sale a valid title against the heirs of the former owner, and all claiming under them, a prior mortgage given by their ancestor would not thereby have been extinguished.

8. The phrase *owner or owners* (*Nix. Dig.* 853, § 77, and *Pamph. L.*, 1852, p. 249, § 7,) was used to denote the *owner of an estate in possession at the time of the assessment*, and not a prior owner, or the owner of an estate in expectancy, or of any executory or contingent interest, and the design of the act was to make the interest of such owner only, and those claiming under him, liable for the tax assessed.

9. The right of a mortgagee is not defeated by a tax sale, where the mortgage was not given by those who were owners of the land at the time of the assessment, or against whom the tax was assessed, but is a title paramount to theirs. Such mortgage is a valid and subsisting encumbrance upon the land in the hands of the purchaser at the sale.

The case was heard upon the bill and proofs.

Gledhill, for complainant.

THE CHANCELLOR. The mortgage which the complainant seeks to foreclose, was given by Malleson and wife on the eleventh of October, 1847, upon a house and lot in the city of Paterson. On the fifteenth of January, 1848, the mortgagor died. Upon his death, the legal title to the mortgaged premises descended to his children, some of whom were minors. By his will, the executors were authorized to sell the land, and in the meantime to apply the net rents and profits to the support and education of his two youngest children.

In 1858 the premises were sold for a term of sixty years, for the sum of \$36.41, by virtue of a tax warrant, to satisfy \$20.70, the arrears of taxes which were assessed on account of the land, against the estate of Malleson, for the years 1854-5-6, together with fees, costs, and expenses. The value of the lot is about \$900. The defendants claim that the purchaser acquired an absolute title to the premises, and that all other rights in, or encumbrances upon the property, are extinguished.

The only ground of controversy is, whether the title ac-

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quired under the sale for taxes is valid, and if valid, whether it is paramount to the title of the mortgagee.

The power to sell land for the payment of taxes, is a naked power, not coupled with an interest, and must be exercised in strict accordance with the provisions of the statute. Every prerequisite to the exercise of the power must precede it. To establish a title under a sale for taxes, it is incumbent on the purchaser to show that all the prerequisites to the exercise of the power of sale, have been complied with.

The deed is not even *prima facie* evidence of that fact. *Stead's Ex'rs v. Course*, 4 Cranch 403; *Williams v. Peyton's Lessee*, 4 Wheaton 77; *Sharp v. Speir*, 4 Hill 76; *Early v. Doe*, 16 How. 610, and cases there cited.

The act under which this sale was made, declares that the tax shall be and remain a lien on the real estate, on account of which the assessment shall be made. *Pamph. Laws* 1852, p. 247. There is no competent evidence that the assessment for the year 1854 was made on account of the land which was sold for the payment of the tax. The assessment for that year contains no description whatever of the land assessed. Opposite the words "estate of John Malleson," under the column headed real estate, is the following entry: "1 H. & 1 L." It may be conjectured that the entry was designed to indicate one house and lot, on account of which the assessment was made. But it does not appear, nor can it be even conjectured from anything apparent on the assessment, what house or lot was intended to be indicated. It is essential to the validity of the proceedings, that it should appear that the tax was assessed on account of the property sold. There is no evidence whatever of the fact, except : recital in the tax warrant in these words: "whereas it appears to the mayor and alderman of the city of Paterson * * * that an assessment of four dollars and fifty cents of taxes for the year 1854, was made by the assessor of South Ward against the estate of John Millen, on account the following lots of land and premises;" describing the

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estion. Assuming that Millen is a clerical mistake for son, how did the fact appear to the mayor and aldermen that any such assessment was made? Certainly not by assessment itself, which is the only competent and legal evidence of that fact. The recital of the warrant is not legal evidence of the fact of an assessment, nor of demand of payment.

There must be other and competent evidence that there was an assessment, and that it was legally made. The tax warrant recites that the sum of seven dollars and twenty cents was assessed for the year 1856, and directs a sale to be made to raise \$21.00, for taxes assessed against the estate or the years 1854-5-6. It appears by the duplicate, that the tax assessed for the year 1856, was but \$7.20, and the whole amount due for taxes from the estate of John Malleson, was but \$20.70. This was a clear excess of authority, and rendered the warrant, so far as it affects the estate in question, null and void.

These, with other objections equally vital, are fatal to the validity of the sale for taxes. No valid title was acquired by the purchaser under that sale, and none could be transferred to his alienees.

If the prerequisites to the sale had been complied with, and the power had been exercised in strict conformity with the statute, so as to confer a valid title against the heirs of John Malleson and those claiming under them, I think it would not have extinguished the mortgage of the defendant.

The tax sale was made under the provisions of "an act to impose taxes a lien on real estate in the county of Passaic, and to authorize the sale of the same for the payment thereof," approved March 19th, 1852. *Pamph. L.* 247. By the second section, it is enacted that any assessment of taxes shall be imposed in said county against any person, on account of any estate of such person or body corporate, shall be and remain a lien on all the lands, tenements, hereditaments, or estates, on account of which said assessment shall be levied, with lawful interest, and costs and fees in relation to

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the assessment and collection thereof, for the space of five years from the time when the taxes became payable. By the sixth section of the act, it is enacted that the land shall be sold and conveyed to such person as will agree to take the same for the shortest term, and pay the tax, interest, costs, fees, and expenses; and that the grantee, by virtue of such sale and conveyance, shall hold and enjoy the said real estate during the term for which he shall have purchased the same, for his own use and benefit, "against the owner owners thereof, and all and every person or persons claiming under her, him, or them, until the said term shall be fully completed and ended."

The power of the legislature, by virtue of its sovereignty, to make the tax a charge upon the estate of all parties interested in the land, and to make the tax title paramount to all other and prior claims and encumbrances, is not questioned. But has that power been exercised in the act under consideration? Was it the intention of the legislature, that the tax deed should operate to destroy all prior interests in the estate, vested or contingent, executed or executory, in possession or expectancy? Is the title under the deed paramount to the widow's right of dower? Or will the sale of land, to pay the tax of a tenant for life, extinguish the title of a remainderman or reversioner? The legislature, I think, did not contemplate such a result. There is nothing in the language of the act to indicate such intention. It is not declared that the title of the grantee in the tax deed shall be paramount to all other interests, nor that he shall hold it against all claims and encumbrances whatever. Nor even that he shall hold it during the term for which he purchases, but that he shall hold it against the owner or owners thereof, and all persons claiming under him or them, until said term shall be ended. Our tax laws have always contemplated that lands shall be assessed to the owner or owners of the land at the time of the assessment. The act of 1854, which makes taxes a lien upon land throughout the state, directs that lands shall be assessed in the name of the owner. The second

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tion of the act in question declares, that any assessment taxes against any person or persons, on account of lands "*such person or persons*," that is, of lands of which he or they are the owner or owners, shall be a lien upon the said lands; and by the seventh section it is enacted, that notwithstanding any mistake in the name or names, or omission to name the real owner or owners of the land in assessing the tax, the assessment shall be valid. The phrase owner or owners, was used to denote the owner of an estate in possession at the time of the assessment, and not a prior owner or owner of an estate in expectancy, or of any executory or contingent interest, and the design of the act was to make the interest of such owner only, and those claiming under him, liable for the tax assessed. That this is the true interpretation of the act, is rendered highly probable by the whole history and policy of our legislation on the subject. The tax requires the land to be assessed against the owner, and his name; it requires a personal demand of the tax, and notice of the time of the meeting of the commissioners of appraisal. In case of a default in payment, after proof of demand, authorizes the sale of the delinquent's goods, or the arrest and sale of his body. Where the tax is assessed upon unimproved untenanted lands, the wood, timber, or herbage might be seized upon by distress and sale, for the payment of the tax. It in no case, by the general tax law of the state, was land authorized to be sold for the payment of taxes. Nor was there tax a lien even, upon the interest or estate in the land of a delinquent tax payer. If there was no tenant upon the land, and no vendible property to be taken by way of redress, there was no means of enforcing the payment of the tax against a non-resident land owner. That legislation should have furnished a remedy for this evil, by subjecting the land of the delinquent tax payer to the lien of the tax, and to be sold for its satisfaction, was to have been anticipated. But it was not to have been anticipated, that the legislature designed utterly to abandon its long approved policy of protecting the rights of the tax payer, subjecting even his personal

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property to sale, only upon default in payment after notice and demand; and to subject the estate of the owners and bona fide encumbrancers of estates in the lands to sale, for the default of another, without notice of the existence of the tax, or an opportunity of redemption.

It will be observed that the law applies as well to residents as to non-resident tax payers, and makes no provision whatever for redemption, either by parties having estates in the land, or by mortgagees. If the law was designed to operate solely upon the estate of the delinquent tax payer, there would seem to be no necessity for such provision. But the privilege of redemption in favor of mortgagees, and owners of rights in land sold for the default of a delinquent taxpayer, is so obviously proper, and its omission so inconsistent with ordinary ideas of justice, that it will be found to be a very general, if not universal, provision of statutes designed to affect the estate of others than the delinquent. Its omission in the present act, is entitled to some weight in determining the real intention of the legislature.

If the tax for the whole value of the land were assessed upon the land as an entire thing, against the mortgagor, or party in possession, there would seem to be more propriety in subjecting the entire estate, including both the interest of the mortgagee and mortgagor, to the operation of the tax sale. But under our system of taxation, the mortgagee is taxed individually for his interest in the land. The mortgagor is assessed only for the value of the equity of redemption. Thus to distinguish between the estate of the mortgagor and mortgagee, and yet to sacrifice the interest of the mortgagee without opportunity of redemption, for the default of the mortgagor in paying the tax assessed against his interest in the land, could scarcely have been within the contemplation of the legislature.

It cannot be denied that the question is not entirely free from difficulty, and that it has given rise to some conflict of opinion. But if it be admitted that the foregoing view is erroneous, still the right of the complainant under his mort-

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is not defeated by the tax sale, because the mortgage was given by those who were owners of the land at the time of the assessment, or against whom the tax was assessed. The mortgage was given in 1847. Malleson, the mortgagor, died in 1848. The legal estate in the land descended to his

The equitable interest was, by the will of the mortgagor, disposed of for the benefit of certain of his minor children. It was sold for taxes assessed in 1854-5-6 to the estate of John Malleson." Admitting, as was held in *Walling v. Collector of Jersey City*, 4 Zab. 108, that the form of the assessment was sufficient to indicate the heirs or devisees, without naming them, it is clear that the mortgagee, the complainant is not within the provision of the statute. Malleson, the mortgagor, was not the owner at the time of the assessment. The heirs of Malleson were then the owners, and the mortgagee does not claim under them, but is in possession paramount to theirs.

will be decreed that the complainant's mortgage was not extinguished by the tax sale, but is a valid and subsisting encumbrance upon the land in the hands of the purchaser at the tax sale. As the claims of the children of Malleson, the mortgagor, and those claiming under the tax sale, are not designed to be finally disposed of, the surplus money, if there be, after satisfying the complainant's demand, will, in a final decree, be directed to be brought into court to the further order of the court.

GERSHOM D. WALLING *vs.* ELIZABETH WALLING.

In an application for alimony *pendente lite*, the case must be taken strongly against the petitioner. The burthen of proof is upon her. All the facts upon which an order for alimony is founded, must be proved. The order must not rest upon mere presumption or conjecture. Where the circumstances upon which a proper adjustment of alimony legally depends, do not appear in the petition, a reference to a master is ordered, to ascertain the real facts of the case.

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4. Under the special circumstances of this case, the question was disposed of upon the facts stated in the petition, without a reference.

Belle, for petitioner.

H. S. Little, for complainant, contra.

THE CHANCELLOR. The complainant filed a bill against his wife for divorce, on the ground of desertion. The wife, having answered, asks an allowance for alimony *pendente lite*, and for counsel fee and expenses. The application is submitted without argument, upon the facts contained in the petition.

The materials for an intelligent and satisfactory disposition of the question are not before the court. All the material facts that are disclosed are, that the husband and wife have been living separate for some years. The wife (with two daughters, one seventeen and the other fifteen years of age) residing with her father, and mainly supporting herself by her own industry. The husband possessed of real and personal estate valued at \$3500. Whether the daughters are accustomed to labor, and able to maintain themselves by their industry; whether the property of the husband is productive or unproductive; whether he is engaged in business, or has other sources of income, does not appear. Upon these circumstances the proper adjustment of alimony would materially depend.

The case must be taken most strongly against the petitioner. The burthen of proof is upon her. All the facts upon which the order for alimony is founded must be proved. The order must not rest upon mere presumption or conjecture.

The case then is, that the parties are in humble life, the wife accustomed to labor, and both she and her daughters able to provide for their own maintenance. The husband possessed of real and personal property to the value of \$3500, consisting probably of a home and furniture, totally unproductive, or if the whole amount be ordinarily productive, furnishing an income not exceeding \$200 per annum.

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trade or business, and no other source of income, or of support. Under such circumstances, justice requires that a very moderate allowance be made for alimony. An allowance which, under other circumstances, would be ample, would prove ruinous to the husband. If the wife were feeble health, or otherwise incapable of supporting herself either of her daughters were dependent upon her support or education, if the husband's property was profuse, if he was engaged in profitable business, or possessed of any other source of income, the case would be altered. It is, obviously, a proper case for a reference, to ascertain the real facts of the case.

As the parties desire a decision of the court without expense of a reference, and as the legal presumptions upon which the decision must rest, are probably in accordance with the real facts of the case, the question is disposed of by the facts stated in the petition, without a reference. An allowance will be made of two dollars per week for herself, and thirty dollars for counsel fee and expenses. Alimony to commence on the fourteenth of August, 1863, of filing the petition, and to be paid quarterly.

STEWART C. MARSH vs. ELIZA ANN MARSH.

A general allegation in a bill for divorce, that the defendant within a certain time has committed adultery, is insufficient. The party with whom the crime is believed to have been committed, must be named; or, an averment to that effect is necessary.

The charge must be so full and specific that the party charged may be called on to answer. It should state the time when, the place where, and if known, the person with whom the offence was committed. It is not necessary to state the day, but the month and year should be stated.

An averment that the statements contained in the bill are made upon information and belief, constitute no ground of demurrer.

In praying a discovery from the defendant, whether since her marriage she has not committed adultery with any person whatever, and

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with whom, and at what time and place, and under what circumstances, is demurrable. The rule is, that the defendant is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to an accusation of that nature. And the objection lies to a particular interrogatory, though the bill be in other respects unexceptionable.

5. Under a general demurrer for want of equity, no objection for want of *form* can properly be raised. A demurrer must express the several causes of demurrer.

6. Demurrer overruled, with leave to amend by stating the grounds of demurrer within twenty days, unless the complainant within that time, shall amend his bill in the particulars objected to.

T. Runyon, for the defendant, in support of the demurrer.

I. The bill does not charge adultery except *on information and belief*.

Our "act concerning divorces," provides that the petition shall *plainly* and *fully* state the cause or causes of the application for divorce, &c.

The bill (when the proceeding is by bill) should be equally explicit in statement.

No affidavit of the truth of the allegations is required to be made by complainant; there is, therefore, no excuse whatever for the vague statement upon information and belief. Under such circumstances, it is surely not requiring too much of the complainant, to insist that he state *positively* the fact of the alleged adultery.

II. There is no attempt at particularity in this bill.

It states that the complainant is informed and believes, and charges the truth to be, that the defendant has committed adultery with *divers persons* at *different places* in New Jersey *since her marriage* to the complainant, and especially that *in all the years*, 1858, 1859, 1860, 1861, 1862, 1863, she committed adultery with J. H. G. Hawes, at Newark, but on ~~what~~ particular day complainant is ignorant.

Here is a period of more than five years through which ~~adultery~~ is charged merely on information and belief, with ~~out~~ a single specification of time, place, or circumstance—*Shelford on Mar. & D.* 399.

So of the statement as to her living in adultery with ~~him~~

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awes. That is merely on information and belief, without specification of time "for a long time past," and without any circumstances.

III. The prayer of the bill requires the defendant to discover whether, "since her marriage to complainant she has not committed adultery with some one or other, with the particulars."

No such answer can be required of the defendant.

IV. If this bill can be sustained, then a simple statement at complainant is informed and believes that since his marriage to defendant she has committed adultery, and praying discovery, would be sufficient in a bill for divorce.

The additional statement, that the complainant is informed and believes that in all of more than five years past, defendant has committed adultery with a certain person at a certain designated city, would not redeem the bill from the objection. For if that allegation were denied by the answer, and capable of proof, the complainant, if the bill be held sufficient, would be at liberty to proceed to proof under the general charge containing no particulars or specifications whatever.

V. The affidavit to the bill is not in compliance with the statute.

The statute requires the complainant's oath that "his complaint" is not made by any collusion, &c.

The affidavit in this case is that the "bill of complaint" is not made by any collusion, &c.

The object of the statute is to guard against collusion in prosecuting suits for divorce, and it is not satisfied by oath that the bill is not *made* (whatever that means) by collusion.

Ranney, for the complainant, contra.

The bill states the cause of the application for divorce to be adultery, committed by the defendant with John H. G. awes, at the city of Newark, on different days in each and all of the years, 1858, 1859, 1860, 1861, 1862, and 1863; and that the defendant, at the time of filing of the bill was

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living, and for a long time previous had been living, in adultery with said Hawes at the city of Newark.

The complainant makes these charges upon "information and belief." See precedents in 2 *Barb. Ch. Pr.* 680; 3 *Hoffman's Ch. Pr. (appendix)* 373.

As to the want of particularity.

All that is required in bills for divorce is, that the offence charged should be stated with such reasonable certainty as to time, place, and person, that the defendant may be able to meet it. The practice in the English Ecclesiastical Courts of setting out all the circumstances of the case is not adhered to, and is not required here.

It is sufficient to charge that the offence was committed with one or more persons unknown to the complainant. *Germond v. Germond*, 6 *Johns. Ch. R.* 347, 349. See also *Bokel v. Bokel*, 3 *Edw. Ch. R.* 376; *Morrell v. Morrell*, 3 *Barb. S. C. R.* 236.

Particular evidence may be given under a general charge of lewdness. *Clark v. Periam*, 2 *Atk.* 333, 337; *Watkyns v. Watkyns*, *Ibid.* 96.

If the acts of adultery charged are sufficiently circumstantial, it is not necessary to specify time and place. *Moore v. Moore*, 3 *Moore* 84; *Chitty's Eq. Dig.*, "Husband and Wife" 1, 6.

The affidavit annexed to the bill is in the same form given in *Potts' Ch. Prec.* 185.

THE CHANCELLOR. The practice in the English Ecclesiastical Courts on a charge of adultery, either in the libel or in the responsive allegation, is to set out circumstantially all the principal facts of the case as proposed to be proved. The libel states, also, the various acts of adultery intended to be relied on; when, where, and with whom committed. *Dillon v. Dillon*, 3 *Curteis* 86; *Shelford on Mar. & D.* 398.

The same degree of particularity has not been adopted in bills for divorce in this country. But it is settled that a general allegation that the defendant, within a specified time,

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itted adultery, is insufficient. The party with whom is believed to have been committed must be named, known, an averment to that effect is necessary. *Church*, 3 *Mass.* 157; *Choate v. Choate*, *Ibid.* *Germond v. Germond*, 6 *Johns. Ch. R.* 347.

principle of good pleading requires that the charge so full and specific that the defendant may know ~~she~~ she is called on to answer. It should state the ~~n~~, the place where, and if known, the person with ~~the~~ offence was committed. It is not necessary as in cases, to state the day, but the month and year stated.

el charging adultery ought to set forth some certain ~~te~~ time, *viz.* the year and month wherein the crime ~~y~~ is alleged to be committed, for without such spe-~~of~~ time, the libel is not valid in law, and the court roceed in the cause, even though the party accused ~~ot~~ oppose the proceeding. *Ayliffe's Pureron* 50; *on Mar. & D.* 399.

ue rule in charging adultery as well as the reason ch it rests, is stated with clearness by Chancellor in *Wood v. Wood*, 2 *Paige* 113: "The only prudent course is to require the charge, whether of ~~on~~ or recrimination, to be stated in the pleadings ~~the~~ issues, in such a manner that the adverse party prepared to meet it on the trial. If the persons with ~~the~~ adultery was committed are known, they must be the defendant's answer, and the adultery must be with reasonable certainty as to time and place. If unknown, the fact should be stated in the answer ~~the~~ issue, and the time, place, and circumstances under ~~the~~ adultery was committed, should be set forth. Party has a right to make such a charge against the mere suspicion, relying on being able to fish up before the trial to support the allegation. When ins-~~i~~ sufficient to justify the charge is given, the party

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will be possessed of the requisite facts to put the charge in a distinct and tangible form on the record."

These principles and reasons apply as well to the bill charging adultery, as to the answer setting it up by way of recrimination. The same principle is recognized in *Clutch v. Clutch, Saxton*, 474; and in *Burr v. Burr*, 2 *Edw. Ch. R.* 448.

The bill in this case charges that the defendant, since her marriage with the complainant, hath committed adultery at divers places in the state of New Jersey, with divers persons, whose names are unknown to the complainant. The parties were married on the 15th of September, 1835. The bill was filed on the 23d of March, 1863. The allegation is tantamount to a general charge that within twenty-eight years before filing the bill, the defendant hath been guilty of adultery. The bill further charges that the defendant, on different days in the years 1858-59-60-61-62-63, but upon what particular days the defendant is ignorant, at the city of Newark, committed adultery with one John H. G. Hawes, and that the defendant is now, and for a long time past has been, living in adultery with the said John H. G. Hawes, at the city of Newark aforesaid. If any part of this charge possesses the requisite degree of certainty, it is the last clause, which charges that the defendant is now living in adultery at Newark, with Hawes, and it would seem that the defendant's evidence must be confined to the single point, that at or about the time of filing the bill, the defendant was guilty of the crime specified. But what is meant by a long time past? and how is an issue to be framed upon the charge? Suppose the defendant denies the charge, and an issue at law is directed. Is the jury to inquire whether the defendant, within a long time past, has been guilty of adultery?

It is objected that the charge of adultery is not made positively, but upon information and belief only. The form is derived from the precedents in the Court of Chancery in New York. The averment that the statement is made upon information and belief is there appropriate, because, by the

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rules of that court, the bill is required to be verified by oath. And in bills which are to be thus verified, as well as in answers and petitions, the several matters stated, charged, averred, admitted, or denied, are required to be stated positively, or upon information or belief only, according to the fact. *2 Barb. Ch. Pr.* 680; *3 Hoffman's Ch. Pr.* (*appendix*) 371; *Rules of 1837*, p. 32, *Rules* 17, 18.

Where the bill is not verified by oath, the statements contained in it are not understood to be within the knowledge of the party. It is not requisite that they should be so, any more than in the case of a declaration at law. The averment, therefore, that the statements are made upon information and belief, though unnecessary and inappropriate, constitutes no ground for demurrer.

The bill prays a discovery from the defendant, whether, since her marriage, she hath not committed adultery with any person whatever, and with whom, and at what time and place, and under what circumstances. This constitutes a valid ground of demurrer. The rule is, that a defendant is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to any accusation of that nature. And the objection lies to a particular interrogatory, though the bill be in other respects unexceptionable. *Mitford's Eq. Pl.* 194; *Story's Eq. Pl.*, § 522, 524, 575.

I have thus expressed an opinion upon the several points discussed in the briefs of counsel. But the demurrer, on examination, proves to be merely a general demurrer for want of equity, under which no objection for want of form can properly be raised. A demurrer must express the several causes of demurrer. *Story's Eq. Pl.*, § 443; *Mitford's Eq. Pl.* 213.

This objection was not raised by counsel, nor is there any intimation, in the briefs submitted, that it has been waived. The demurrer cannot be allowed as it now stands, because it is clear that the bill is not defective for want of equity. Leave may be given to amend the demurrer. *Glegg v. Legh*, 4 *Madd.* 208; *Thorpe v. Macauley*, 5 *Madd.* 218.

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In such case leave would be given, if desired, to the plaintiff to amend also, which would avoid the necessity amending the demurrer. The objections raised are, ¹ theless, too serious to justify the court in requiring an amendment to the bill in its present shape. As the most effectual of attaining the ends of justice without unnecessary delay, the demurrer is overruled, with leave to amend the defendant's bill within twenty days from the date of the order, unless the complainant, within that time, shall amend his bill to particular objects objected to, for which purpose leave is granted.

The order is made without costs to either party as against the other.

GEORGE A. KEENE and others *vs.* POLLY MUNN and others.

1. At common law personal estate is the primary fund for the payment of debts, and the heir-at-law may call upon the executor to exonerate land by discharging the mortgage debt out of the personal estate. The devisee stands in the same position as the heir, and is entitled to the same equity.

2. But the mortgagee, or alienee, of the heir or devisee, has a right to equity. The principle is adopted in favor of the heir or devisee also, not in favor of his alienee.

3. Where a mortgagor has from time to time aliened certain portions of the mortgaged premises, that portion not aliened will be first sold to satisfy a decree of foreclosure and sale; if such sale do not bring sufficient to satisfy the decree, then the parcel last aliened will be sold, and so on in inverse order of the conveyances, until the decree is satisfied.

Ranney, for complainants.

Taylor, for defendants, Ira and James Peck.

Bradley, for defendant, Aaron Peck.

Weeks, for defendant, B. W. Benson.

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THE CHANCELLOR. The bill is filed to foreclose a mortgage given by Isaac Munn and Polly, his wife, for \$500, on two tracts of land in Orange. The mortgage bears date on the eleventh of October, 1824, and was given to Aaron L. Burnet, and by him assigned to the complainants. On the thirtieth of April, 1834, the mortgagor and wife conveyed one of the tracts to William Peck, by whom it was subsequently conveyed to Ira and James Peck, two of the defendants. This lot being first aliened by the mortgagor, it is admitted that the mortgage debt is to be charged primarily on the other tract known as the homestead lot. On the fourth of November, 1853, the mortgagor and wife conveyed part of the homestead tract to James H. Simpson. Simpson gave a mortgage of the same date with the deed, to his grantor for \$500, part of the purchase money. That mortgage is now held by Polly Munn, the widow and surviving executor of Isaac Munn.

Isaac Munn, the mortgagor, died on the fifteenth of August, 1856. By his will, duly executed to pass real estate, he devised to his wife, Polly Munn, the use of all his lands during her widowhood; and to his son, John O. Munn, his homestead house and lot, together with a lot of mountain woodland, subject to the payment of sundry legacies to his other children, to be paid in one year after the death of his wife.

On the eleventh of August, 1860, John O. Munn gave to Aaron Peck a mortgage on his interest in the real estate so devised to him by his father, the mortgagor, for \$300. On the thirteenth of December, 1861, he conveyed the equity of redemption in the premises to Benjamin W. Benson. Benson, by his answer, claims that in equity the amount of the \$500 mortgage, given by Simpson to Isaac Munn, and now in the hands of his executrix, should be applied in exoneration of the land devised to John O. Munn by his father, the mortgagor, and that to this end, that part of the homestead lot sold and conveyed by the mortgagor to Simpson, should be first sold to pay and satisfy the mortgage of the complainant.

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By his answer he alleges that he purchased subject to the mortgage to Aaron Peck, and to the legacies contained in the will of Isaac Munn, deceased, and subject to no other encumbrance; and that at the time of the purchase he was informed by the vendor of the existence of the complainant's mortgage, but that the mortgagor in his lifetime had appropriated the mortgage given by Simpson to him, to the payment and discharge of the complainants' mortgage; and that the executors of the said Isaac Munn then held the Simpson mortgage for that purpose, and would so apply it.

There is no evidence in support of this allegation of the defendant's answer. The only question in the case is, whether the parties claiming title under John O. Munn, the devisee of the mortgagor, are entitled to have the complainant's mortgage paid out of the personal estate of the mortgagor in exoneration of the land devised.

At common law, personal estate is the primary fund for the payment of debts, and the heir-at-law may call upon the executor to exonerate the land by discharging the mortgage debt out of the personal estate, upon the ground that the personal estate had the benefit of the money for which the mortgage was given. The devisee stands in the same position as the heir, and is entitled to the same equity. But the mortgagee, or alienee, of the heir or devisee has no such equity. The principle is adopted in favor of the heir or devisee alone and not in favor of his alienee. *Bacon's Abr., Mortgage* E *Haren v. Foster*, 9 Pick. 112; *Scott v. Beecher*, 5 Maddoc 96; *Cumberland v. Codrington*, 3 Johns. Ch. R. 229; *Hamilton v. Worley*, 2 Vesey 62; 1 Washb. on Real Prop. 566.

The common law rule in favor of the heir or devisee, is recognized and altered by a provision of the revised statutes of the state of New York, which makes the land devised subject to a mortgage, the primary fund for the satisfaction of the mortgage debt. 1 Rev. Stat. 749, § 4; *Waldron v. Waldron*, 4 Bradf. R. 114; *Taylor v. Wendel*, *Ibid.* 32; *Mosely v. Marshall*, 27 Barb. 42; *Rapalye v. Rapalye*, *Ibid.* 610.

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The complainants are entitled to a decree for foreclosure and sale of the mortgaged premises in the order and priority above indicated. That part of the mortgaged premises not aliened by the mortgagor in his lifetime, must be first sold.

CATHARINE S. WYCKOFF and others vs. JOHN M. WYCKOFF
and others.

1. The mere proof of the loss or destruction of an instrument does not, as a matter of course, let in the party to give secondary evidence of its contents. He who voluntarily, without mistake or accident, destroys primary evidence, thereby deprives himself of the production and use of secondary evidence.

2. If the destruction of an instrument was accidental, or if it occurred without the agency or assent of the party offering it, secondary evidence is admissible. But if it was voluntarily destroyed by the party, secondary evidence of its contents will not be admitted, until it be shown that it was done under a mistake, and until every inference of a fraudulent design is repelled.

3. Where an adequate motive for the destruction of a will is assigned by the party seeking to establish it, and clearly confirmed by the evidence the court will not, upon mere conjecture, impute an inadequate and dishonest motive.

4. The true rule is, that the will may be established upon *satisfactory* proof of its destruction, and of its contents or substance. Whether the proof be by one witness, or by many, it must be clear, satisfactory, and convincing.

5. The cost of establishing the will, and of taking out letters of administration, ordered to be paid out of the estate, the burden falling upon the residuary legatee, by whose act the costs were occasioned.

Leupp, for complainants.

J. N. Voorhees, for defendants.

THE CHANCELLOR. The bill is filed by certain legatees under the will of Liny Van Loren, deceased, to establish the

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will, to the end that letters testamentary may be issued thereon.

The factum of the will, the competency of the testatrix, and the destruction of the instrument after the death of the testatrix, are clearly established. There is no suggestion that there was any revocation of the will. The only question is, whether there is sufficient proof of the contents of the instrument. They are proved by the testimony of one witness alone, and that witness interested in the result. He is the residuary legatee under the will, and not only so, but the will was voluntarily destroyed by him. Upon this statement of facts, three distinct questions are presented for consideration.

1. Is the witness competent?
2. Is he credible?
3. Can the will be established upon the testimony of one witness alone as to its contents?

The interest of the witness in the event does not disqualify him. But the more important question is, whether a party who has voluntarily destroyed a will or other instrument, will be permitted to prove its contents by secondary evidence, either by his own testimony, or by the testimony of others. In considering this question, it is proper to regard the evidence as offered by the witness in his own behalf. For although the bill is filed in the name of other legatees, it is not denied that it is filed by the procurement of the residuary legatee, and that he is the principal legatee under the will.

The mere proof of the loss or destruction of an instrument does not, as a matter of course, let in the party to give secondary evidence of its contents. "He who voluntarily— without mistake or accident, destroys primary evidence — thereby deprives himself of the production and use of sec— ondary evidence." *Broadwell v. Stiles*, 3 *Halst. R.* 58.

If the destruction was accidental, or if it occurred with — out the agency or assent of the party offering it, secondar — evidence is admissible. But if the instrument was volun —

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tarily destroyed by the party, secondary evidence of its contents will not be admitted, until it be shown that it was done under a mistake, and until every inference of a fraudulent design is repelled. *Riggs v. Tayloe*, 9 Wheaton 483; *Rennier v. Bank of Columbia*, *Ibid.* 581; *Blade v. Noland*, 12 Wend. 173; *Cow. & Hill's notes to 1 Phil. Ev.* 452, note 861, p. 1214.

The circumstances under which the will was destroyed are clearly proved. The property of the testatrix was derived from her father, Jacob Vandoren, who died in 1811. By his will he bequeathed a share of the residue of his estate to his daughter Lenah (the testatrix). And if she died without issue, he further bequeathed such part of her share as remained unexpended, to his surviving children. Her share had been paid over to her by the executors. On the 1st of April, 1824, she placed in the hands of John M. Wyckoff, as her agent and attorney, promissory notes amounting to \$1250. On the 20th of January, 1853, she executed the will now sought to be established, and placed it in the hands of her attorney and agent. By the will she appointed Wyckoff the sole executor, and made him the residuary legatee. He retained possession of the will, and continued to act as the agent of the testatrix to the time of her death. She died in May, 1859, without issue. Immediately upon her death, this property was claimed by the executors of Jacob Vandoren, as a part of his estate, being bequeathed over to his other children in the event of his daughter's death without issue. If the witness himself read the will, he would naturally have concluded that such was its true meaning. The surrogate whom he consulted, so advised. Eminent counsel, upon whose judgment he would naturally rely, entertained and expressed that opinion. The true construction of the will was indeed a question of doubt and difficulty, and was settled by a decree of this court upon a bill filed for that purpose. That Wyckoff was firmly convinced that his testatrix had no right to dispose of the property, and that it reverted to the estate of her father, is

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evinced by the fact that he did not offer the will of the testatrix for probate, but consented to give up the property to the executors of Jacob Vandoren. He was in fact only prevented from doing so, by a question that arose as to the amount for which he was responsible. While under this belief, and because, as he states, he deemed the will of Lany Vandoren useless and inoperative, he destroyed it. Its destruction is clearly proved, and that at the time of its destruction, Wyckoff stated that it had been decided that the testatrix had no right to make a will, and that it was good for nothing. It is proved past all controversy, that the will was destroyed by the witness under the honest belief that the testatrix had no right to dispose of the property, and that consequently the will was worthless. Nor is there any rational ground to infer any fraudulent purpose in the destruction of the will. The party by whom it was destroyed is the executor of the will, and the legatee of a large portion of the estate. He was not one of the next of kin of the testatrix, and could gain nothing by her intestacy. There is a suggestion in the testimony of one of the witnesses, that the will might have furnished some evidence of the amount of property in the hands of Wyckoff, and that this was the real motive of its destruction. The answer to this suggestion is, that the will of the testatrix could furnish no competent evidence of the amount of her property in the hands of her agent, he not being the scrivener; much less could a will, made in 1853, furnish any competent evidence of the amount of her property in 1859. A more decisive answer is, that when an adequate motive for the destruction of the will is assigned by the party, and clearly established by the evidence, the court will not, upon mere conjecture, impute a inadequate and dishonest motive.

Is the party a credible witness? His character for veracity is unimpeached. There is nothing in his testimony calculated to impair the confidence which the court may repose in the testimony of an unbiased witness. The circumstances under which the will was destroyed, are calculat-

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rather to strengthen than to shake confidence in his integrity. He was the confidential agent and attorney in fact of the testatrix, having in his hands the bulk of her property for more than thirty years. He is constituted her sole executor and residuary legatee. It is evident that the testatrix reposed entire confidence in his integrity of character. The Court see no reason to suppose that her confidence was misplaced.

It is said in some of the older authorities, that if the will be lost, two witnesses, who are superior to all exception, who read the will, prove its existence after the testator's death, remember its contents, and depose to its tenor, are sufficient to establish it. *4 Burn's Ecc. Law* 209; *Toller on Executors* 71.

But this statement does not define the limit of the rule even in the Ecclesiastical Court.

In *Trevelyan v. Trevelyan*, 1 *Phill.* 149, the will was established upon the testimony of one witness, and proof of what the testator said he had done.

In *Davis v. Davis*, 2 *Addams*, 223, one witness testified that the codicil, as near as she could recollect, for she read it but once, was in the following words (stating the bequest). "This she knows was the substance, though she will not undertake to swear that she has given the words correctly." Sir John Nicholl said, the tenor of the codicil is proved by the probability of the disposition, by the declaration of the testator, and by a witness who actually read it.

In *Davis v. Sigourney*, 8 *Metc.* 487, the fact that the contents of the will were attempted to be established by a single witness, was not suggested as a ground of objection. The will was rejected solely on the ground, that the recollection of the witness was not sufficiently definite as to the contents of the will.

In *Dickey v. Malechi*, 6 *Missouri* 177, it was expressly ruled, that the testimony of one witness is sufficient to prove the contents of the will.

The true rule is, that the will may be established upon sat-

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isfactory proof of the destruction of the instrument, and of its contents or substance. Whether the proof be by one witness, or by many, it must be clear, satisfactory, and convincing.

If the scrivener who drew the will, produce and prove a copy of the will, prepared and preserved by himself, there would be no hesitation in establishing it, though proof of its contents rest upon the testimony of a single witness. It is seen that the evidence of its contents is perfectly satisfactory. But where five witnesses are examined who do not concur as to the contents of the instrument, it will be rejected, though the witnesses may profess to speak with confidence. *Rhodes v. Vinson*, 9 Gill 169.

In this case the witness testifies with entire confidence and distinctness as to the contents of the will. He read the will two or three times immediately before its destruction, and the next day reduced its contents to writing. That draft he produced, and although he does not profess to recollect the words used, he is confident as to the substance of the will. The instrument is brief, and its provisions might readily be retained in his recollection. He was probably familiar with its contents. It was delivered to him on its execution, remained for years in his possession, and was not destroyed till several weeks after the death of the testatrix.

The tenor of the will as proved, is sustained by the probability of the disposition. The testatrix was a single woman, advanced in years, not living with her relatives, and having her entire business affairs in the hands of an agent. She gives legacies to two of her nieces, and to persons with whom she had lived, or who had befriended her, and the residue of the property to her friend and agent, upon whom she relied for the care of her money and the transaction of her business. As her means were limited, it was natural that she should desire to satisfy a claim upon her justice out of her property after her death, rather than during her life. The declarations of the testatrix, if entitled to any weight, are in accordance with the provisions of the will as proved. There is

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nothing in the evidence offered, in the probabilities of the case, or in the character of the witness, or of his evidence, that will justify a doubt as to the credibility of the witness, or the accuracy of his testimony.

I have withheld a decision in this cause, not from any doubt as to the truth of this case, or because the evidence was in itself in any degree unsatisfactory, but because I entertained serious doubt whether, upon grounds of public policy, a will should ever be established by the testimony of a single witness, by whom the original will was destroyed, and who is interested in sustaining it. On this account the question has been considered as though the bill were filed by the witness himself, and he alone were interested in the result. In point of fact this bill is filed by other legatees. If they alone were interested, the case is clear in their favor. If the witness took no interest under the will, not a doubt could be entertained of their right to recover. There is no ground upon which one part of the will can be established, and the residue rejected. The same evidence extends to all its provisions.

A decree will be made establishing the paper marked Exhibit A, as the will of Lany Vandoren, and setting aside the letters of administration issued on the application of the next of kin, as improvidently granted. The cost of establishing the will and of taking out letters of administration, must be paid out of the estate. The burden will justly fall upon the residuary legatee, by whose improvident act in destroying the will, the difficulty has been created and the costs occasioned.

SOPHIA A. KIRKPATRICK vs. JOHN T. WINANS.

1. Where a party negotiates with another's agent for the loan of a sum of money, and delivers to the agent a bond and mortgage duly executed to the principal, but the whole amount of money is not paid over to the mortgagor by the agent; in such case, if the principal settle with the administrator of his agent, and accepts the securities as evidence of so much

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money advanced by the agent, and allows the amount in the settlement of the account, the mortgagor is estopped, as against the principal, from denying that he received the money.

2. If the money were not paid over by the agent to the mortgagor, and he designed to look to the mortgagee, he should have given notice of such intention. By failing to do so, and permitting the settlement to be made, he is estopped from making any claim against the mortgagee.

3. The principal is not liable for the unauthorized or wrongful act of his agent in withholding a part of the money, or in giving his own notes payable at a future day, *in lieu* of the money of the principal in his hands. The remedy is against the agent only.

J. Chetwood, for complainant.

1. The whole transaction, as between the mortgagor and the mortgagee, closed with the delivery of the mortgage.

Whatever money was then in the hands of Chetwood, he held as the agent of Winans, the mortgagor. If not paid over, he must seek his remedy against the administrator of the agent.

2. The defendant, by his own actions, is estopped from setting up a claim against the mortgagee.

The amount loaned, at the time of the transaction, was in the hands of the agent.

By the execution and delivery of the bond and mortgage, the mortgagor admitted the receipt of the money.

The mortgagee has settled with the agent and his administrator, allowing him for the full amount advanced. *Cheever v. Smith*, 15 Johns. R. 276; *Waters' Appeal*, 11 Case ~~22~~ 523.

The mortgagor has paid interest on the whole amount ~~on~~ the mortgage.

Williamson, for defendant.

THE CHANCELLOR. The bill is filed to foreclose a mortgage given by the defendant to the complainant, bearing date on the first of January, 1861, for \$2000, payable in one year, with interest. The defendant, by his answer, admits

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the mortgage, but alleges that he did not receive the whole amount of the loan for which the mortgage was given. That he made the arrangement for the loan with the agent and attorney of the complainant, who is now deceased, who, as such agent, agreed to advance \$2000 on the mortgage security. That, on the delivery of the bond and mortgage by the defendant, nothing was paid to him, but that he subsequently received payment, amounting in the whole to \$1822.58, and no more. That several of these payments were made long after the date of the bond, and the defendant claims a deduction of interest from the principal of the bond up to the time that such sums were respectively advanced to him. Evidence has been taken tending to prove the allegations of the answer. The only question now submitted for decision, is not upon the weight or credibility of the evidence, but whether, admitting it to be true, it is competent evidence to affect the complainant's claim upon the mortgage.

The complainant holds the defendant's bond and mortgage for the full sum of \$2000. At the date of the mortgage she had, in the hands of her agent, that sum of money to be loaned. It appears, by the evidence, that the agent charged his principal with the sum of \$2000, as invested in this bond and mortgage at its date. Since the death of the agent, the mortgagee has settled with his administrator upon the basis of that account, and, in the settlement, allowed the sum of \$2000 for so much advanced by the agent upon the mortgage. The bond and mortgage were evidence of so much money advanced by the agent, and upon the faith of those securities the administrator was entitled to a credit for that amount upon the settlement. That settlement was effected upon the faith of securities which the defendant himself gave. He is now estopped from denying that he received the money. If he has not received the amount to which he was entitled upon the execution of the mortgage, the money is not in the complainant's hands, but in the hands of the agent. If the money was not paid over by the agent to the mortgagor, and he designed to look to the mortgagee, he should have given her

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notice. By failing to do so, and permitting her to settle with the agent, allowing him for the full amount advanced, he is estopped from claiming the amount as against the principal. *Wyatt v. Marquis of Hertford*, 3 East 147; *Cheever v. Smith*, 15 Johns. R. 276.

If the money was withheld, it was the unauthorized act of the attorney, without the knowledge, consent, or approbation of the principal, express or implied. She neither authorized, nor sanctioned it. She derived no benefit from it. The attorney had no authority to withhold the money upon making the loan, or to give his own notes in lieu of the money. If the attorney gave his own notes, payable at a future day, without interest, in lieu of the money of his principal in his hands, it was the wrongful act of the attorney, effected by the co-operation of the defendant. The principal is never liable for the unauthorized or wilful act of his agent.

The only question is, whether the defendant shall look for redress to the mortgagee, who has advanced the full amount of the loan, or to the attorney in whose hands the money is. In equity there can be no claim against the mortgagee.

As between the mortgagee and her attorney, and the mortgagor, the transaction is closed without the imputation of fraud or unfairness. The defendant's bond and mortgage have been received by the mortgagee as equivalent for the money advanced, and a settlement made as between the attorney and his principal.

After the death of the attorney, the mortgagor recognized the validity of the mortgage, and paid interest upon it.

There were mutual dealings between the mortgagor and the attorney, who acted as the agent of the mortgagee, on his individual account. There was a running account between them, which was open and unsettled at the time of the attorney's death. Difficulties have arisen in regard to the account. There is no propriety in transferring that controversy to the claim of the mortgagee.

The defendant must account for the amount due upon the face of the mortgage.

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EXECUTORS OF ISAAC ROWE *vs.* SARAH WHITE.

Isaac Rowe, by his last will and testament, gave as follows: "I give and devise unto Sarah White the sum of \$5000, to be paid unto the said Sarah White; and if the said Sarah White die without an heir or heirs, the said sum of \$5000 is to go to Leonard Crum, the son of Henry Crum." Held—

The first legatee takes a present vested interest in the fund, liable to be divested upon the contingency of her dying without issue. The limitation over, being upon a definite failure of issue, is good by way of executory bequest.

1. In the case of a specific bequest of chattels for life, and a limitation over by way of remainder, the legatee in remainder is no longer entitled, as formerly, to call upon the tenant for life for security that the chattels shall be forthcoming after his decease. The recognized practice of the court now is, to require an inventory to be signed by the devisee for life, and to be deposited with the master for the benefit of all parties.

2. Personal property not given specifically but generally, or as a residue of personal estate, must be converted into money; the interest only to be enjoyed by the tenant for life, and the principal reserved for the remainderman. This rule prevails, unless there be in the will an indication of a contrary intention.

3. Where a legacy is given generally, subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of a year from the testator's death, and he is not bound to give security for repayment of the money in case the event should happen.

4. In the case of a legatee for life, or subject to a limitation over, in order to justify the requisition of security from the first legatee, there must be danger of the loss of the property in the hands of the first taker.

5. The mere fact that the legatee for life is a *feme covert*, cannot in itself furnish any evidence of danger of loss.

6. A bill for relief on the ground of danger of loss of a legacy for life, subject to a limitation over by way of remainder, is in the nature of a bill *qua timet*, and may be filed as well against the executor himself, where the fund is in his hand, as against the legatee for life, where the fund is in his hand.

B. Vansyckel, for complainants.

It is admitted that Sarah White, the first legatee, took an estate for life. The statute, *Nix. Dig.* 917, § 4, removes all doubt as to the construction.

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It is admitted that the legatee for life is forty-six years of age, that she has never had any children, and that her husband is still living.

The recent cases show that the legatee for life is entitled to the fund without security, unless there is something special, which in the discretion of the executors requires it. *Slanning v. Style*, 3 P. W. 334; *Leeke v. Bennet*, 1 Atk. 470; *Bill v. Kinaston*, 2 Atk. 82; *Covenhoren v. Shuler, Paige* 132; *Howe v. Earl of Dartmouth*, 7 Vesey 137; *Gri-fiths v. Smith*, 1 Vesey 97; *Colston v. Morris*, 6 Madd. 82; *Loveday v. Hopkins, Ambler* 273; 1 *Roper on Leg.* 315; Mod. 93; 2 *Kent's Com.* 354, notes; *Evans v. Iglehart, Gill & Johns.* 171; *De Peyster v. Clendining*, 8 *Paige* 29.

If a legacy goes into the hands of a married woman, the husband will take it. It will be lost to the legatee in remainder.

If a spendthrift or insolvent were about to receive it, security would be required.

If the legacy remain in the hands of the executors, as there is danger of loss, security may be required. *Cleveland v. Havens*, 2 Beas. 101.

Van Fleet, for defendant.

The bill does not raise the question of danger. The question is as to the personal liability of the executors.

Mrs. White will hold the fund as an unmarried woman. *Nix. Dig.* 503, § 3.

The intention is clear. It is a gift of *money* to be ~~over~~ over, not of *use*.

The executors must execute the will. Thus only, will they be relieved from liability.

Leonard Crum must look to the estate of Mrs. White, *not* to the executors. *Dewitt v. Schoonmaker*, 2 Johns. R. 243.

I admit that, at the instance of Crum, the legatee in remainder, the court might require security. 1 *Story's Eq.*, § 604.

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The legatee in remainder is a party, but does not answer. He does not ask security. 2 *Williams on Ex'rs* 1192; 18 *Vesey* 131; 1 *Vesey* 97; 1 *Roper on Leg.* (3d ed.) 752; *Hull v. Eddy*, 2, *Green's R.* 169.

As to the question of costs. *Kay v. Kay's Ex'rs*, 3 *Green's Ch. R.* 502; 2 *Beas.* 121.

Beasley, on the same side.

There are three classes of cases.

1. Bequests of specific chattels.

In the case of a bequest of specific chattels, the old practice was to require security of the legatee for life. *Bracken v. Bently*, 1 *Ch. R.* 110; *Hart v. Hart*, *Ibid.* 260; 1 *Eq. Cases Ab.* 78; *Freeman's Ch. R.* case 280, p. 206.

The practice was changed before Hardwicke's time, on principle. An inventory was then required to be deposited with the master; security no longer taken. *Bill v. Kinaston*, 2 *Atk.* 82; *Leeke v. Bennet*, 1 *Atk.* 470; 2 *P. W.* 1258; 2 *Kent's Com.* 354; *Foley v. Burnell*, 1 *Bro. Ch. R.* 279; *Conduit v. Soane*, 1 *Collyer's R.* 285.

The rule is changed to carry out the *intention* of the testator. Here the testator did not require security.

2. General bequest of residue of personal estate for life, with remainder over.

There the executors were to convert property into money; invest the proceeds, and pay the interest to the legatee for life. 2 *Kent's Com.* 354; 1 *Story's Eq.*, § 604, note 1.

3. Legacy given generally, subject to limitation over on the happening of a subsequent event.

There legatee never required to give security, except in case of *danger*. All cases, with one exception, agree. 2 *Williams on Ex'rs* 1251, 1192; 1 *Roper on Leg.*, (2d Am. ed.) ch. 14, § 2, p. 864. The contrary doctrine held in *Cuthoun v. Thomson*, 2 *Molloy* 281.

The principle is, that as the testator has entrusted the legatee with money, no one has authority to require security. *Hull*

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v. *Eddy*, 2 *Green's R.* 169, 176; *Vanpelt's Ex'rs v. Veghte*, *Ibid.* 207; *Homer v. Shelton*, 2 *Metc.* 194; *Hudson v. Wadsworth*, 8 *Conn.* 349; *Langworthy v. Chadwick*, 13 *Conn.* 46.

A case of danger must be made in pleading. The legatee for life might show that she has a large estate, and that there was, therefore, no cause for requiring security. She has a right to respond.

The mere fact that the legatee for life is a married woman, does not make a case of danger.

If the court say she must give security, it must declare in all cases that the wife must give security.

The will expressly directs payment to her. It was the intention of the testator.

Wurts, in reply.

The will is inartificially drawn. The phrase to be "paid ~~to~~ to legatee," makes no difference.

It is immaterial whether Crum has answered or not. *Clereland v. Harens*, 2 *Beas.* 101.

In the absence of danger no security will be required: if however, there is danger, it will be required.

It was a delicate matter for Crum, the executor, to question the solvency of his sister and her husband. So it was for the nephew and legatee in remainder.

Mr. Wurts further cited, 1 *P. W.* 502, 652; *Fairch ~~—~~* v. *Crane*, 2 *Beas.* 103; *Condit's Ex'rs v. King*, *Ibid.* 31—
Kay v. Kay's Ex'rs, 3 *Green's Ch. R.* 502; 34 *Ala.* 379 = *Jarman on Wills* 499; *Stone v. Maule*, 2 *Sims.* 490; 1 *Story Eq.*, § 597, 603; *Horrell v. Waldron*, 1 *Vernon* 26; 2 *Foster Eq.* 321 (Bk. 4, p. 1, ch. 1, § 2); 2 *Story's Eq.* 845, 846; *Cooper v. Williams*, *Finch's Prec. in Chan.* 72, case 65.

THE CHANCELLOR. Isaac Rowe, of the county of Hurst ~~in~~ don, in and by his last will and testament, gave as follows: "I give and devise unto Sarah White, the wife of John Whi ~~te~~,

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the sum of \$5000, to be paid unto the said Sarah White; and if the said Sarah White die without an heir or heirs, the said sum of \$5000 is to go to Leonard Crum, the son of Henry Crum."

The executors have filed their bill against the first legatee and her husband, and the legatee in remainder, asking that the proper construction of the bequest should be settled for their aid and direction, and that the money may, for their protection, be paid under the direction of the court.

The bill alleges that the legatee, Sarah, and her husband, demand the payment of the legacy, and threaten to institute proceedings at law against the executors, unless the money is forthwith paid; and that Leonard Crum, the legatee in remainder, forbids the payment of the money to Sarah White, unless she give ample security that the legacy shall be paid to Crum, in case the said Sarah White should die without issue.

Sarah White and her husband have answered the bill, claiming the payment of the legacy without giving security. No answer has been filed by Crum. There is no dispute as to the facts. Sarah White, the legatee, has had no issue born of her body, and is forty-five years of age.

There can be no question as to the construction and effect of the bequest. Sarah White, the first legatee, takes a present vested interest in the fund, liable to be divested upon the contingency of her dying without issue. The limitation over being upon a definite failure of issue, is good by way of executory bequest. *Hull v. Eddy*, 2 Green's *R.* 175, and cases there cited.

The only question made by the pleadings is, whether the first legatee is entitled to receive the fund, without giving security for its repayment in the event of her dying without issue.

Where there is a specific bequest of chattels for life, and a limitation over by way of remainder, the ancient rule in chancery was, that the person entitled in remainder, could

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call upon the tenant for life for security that the chattel should be forthcoming after his decease; the tenant for life being regarded as a trustee for the remainderman. *Bracker v. Bently*, 1 Ch. R. 110; *Hart v. Hart*, *Ibid.* 260; 1 Eq Cas. Ab. 78, "Bills E;" *Vachel v. Vachel*, 1 Chan. Cas 129; *Freeman's Ch. R.* 206, case 280.

The last of these cases was decided in 1695. In *Leeke v Bennet*, 1 Atkyns 470, decided in 1737, upon an application by the legatee in remainder, that the legatee for life shoule give security for the forthcoming of the goods, Lord Chancellor Hardwicke is reported to have said, he never knew i. done, and therefore would not oblige the defendant to do it but directed an inventory to be made and signed by the defendant and his wife, who was the legatee for life, and to be delivered to the plaintiff.

In *Bill v. Kinaston*, 2 Atkyns 82, decided in 1740, the same Lord Chancellor is reported to have said, that when goods are given to a person for life only, the old rule of the court was, that such person should give security that they should not be embezzled; but the method now is for an inventory to be signed by the devisee for life, and to be deposited with the master for the benefit of all parties.

Since the time of Lord Talbot, in 1734, this seems to have been the recognized practice of the court. *Slanning v. Sty* 3 P. W. 336; *Richards v. Baker*, 2 Atkyns 321; *Foley v. Burnell*, 1 Brown's Ch. Cas. 249; *Conduitt v. Soane*, 1 Collyer's R. 285; *Covenhoven v. Shuler*, 2 Paige 132; *De Peyster v. Clendining*, 8 Paige 303; 2 Kent's Com. 354; 2 Williams on Ex'rs 1258.

This class of cases is limited to specific bequests of chattel to the first taker for life only.

But personal property, not given specifically but generally or as a residue of personal estate, must be converted into money; the interest only enjoyed by the tenant for life, and the principal reserved for the remainderman. *Hoice v. Earl of Dartmouth*, 7 Vesey 137; *Benn v. Dixon*, 10 Simons 636; *Chambers v. Chambers*, 15 Simons 183; *Randall v. Russell*

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3 Mer. 193; *Covenhoven v. Shuler*, 2 Paige 122; *Clark v. Clark*, 8 Paige 152; *Cairns v. Chaubert*, 9 Paige 163; *Hull v. Eddy*, 2 Green's R. 176; *Ackerman's Adm'r's v. Vreeland's Ex'r*, 1 McCarter 23; 2 Kent's Com. 353; *Lewis on Perp.* 100; 2 Story's Eq. Jur., § 845 a.

The rule prevails, unless there be in the will an indication of a contrary intention. *Collins v. Collins*, 2 Mylne & Keene 703; *Pickering v. Pickering*, 2 Bearan 31; S. C. 4 Mylne & Cr. 289; *Randall v. Russell*, 3 Mer. 194; *Merrill v. Emory*, 10 Pick. 512; 2 Williams on Ex'r's 1197.

But where a legacy is given generally, subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of a year from the testator's death; and he is not bound to give security for repayment of the money in case the event should happen. *Griffiths v. Smith*, 1 Vesey 97; *Fawkes v. Gray*, 18 Vesey 131; *Hull v. Eddy*, 2 Green's R. 177; *Ex'r's of Condict v. King*, 2 Beas. 383; 2 Williams on Ex'r's, 1192; *Homer v. Shelton*, 2 Metc. 194; *Fiske v. Cobb*, 6 Gray 144; 1 Roper on Leg., ch. 14, § 11, 684; *Hudson v. Wadsworth*, 8 Conn. 349; *Langworthy v. Chadwick*, 13 Conn. 46.

Either in the case of a legatee for life, or subject to a limitation over, in order to justify the requisition of security from the first legatee, there must be danger of the loss of the property in the hands of the first taker. *Slanning v. Style*, 3 P. W. 334; *Conduitt v. Soane*, 1 Collyer's R. 285; *Homer v. Shelton*, 2 Metc. 194; *Fiske v. Cobb*, 6 Gray, 144; *Hudson v. Wadsworth*, 8 Conn. 249; *Langworthy v. Chadwick*, 13 Conn. 46.

In *Slanning v. Style*, Lord Talbot says: "Generally speaking, where the testator thinks fit to repose a trust, in such case, until some breach of that trust be shown, or at least a tendency thereto, the court will continue to intrust the same hand, without calling for any other security than what the testator has required." But in that case the legatees in remainder were also the executors, and to the trust reposed in

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them in that capacity by the testator, the remark of the Chancellor must have been mainly directed.

But upon a somewhat analogous principle, regarding the first legatee as a trustee for the legatee in remainder, the courts have held that to require security, except in case of danger, would not be in accordance with the will of the testator.

In the absence of any suggestion of danger or loss, the legatee in this case is entitled to receive her legacy without giving security, either to the executors or to the legatee in remainder. Under such circumstances, the executors incur no personal hazard by paying the money.

It was urged upon the argument that the mere fact that the first legatee is a married woman, furnishes evidence of danger of loss, upon which the court should require security for the protection of the legatee in remainder. The mere fact that the legatee is a feme covert, cannot in itself furnish any evidence of danger of loss. Both she and her husband may be entirely responsible. But if the fact were otherwise it could not, under the pleadings in this cause, constitute a ground for the interference of the court. No relief is sought upon that ground, nor does the bill contain any intimation of danger of loss. Application for relief upon that ground would come more appropriately from the legatee in remainder, or if he be an infant, from his guardian or next friend. Usually, where the court have required security, it has been at the instance of the legatee himself. Such bills are in the nature of a bill *quia timet*, and may be filed as well against the executor himself, where the fund is in his hand, as against the legatee for life, where the fund is in his hand. 1 *Eq. C. Ab.* 78, "Bills E," 1 *Maddock's Ch. Pr.* 219; 1 *Story's Eq. Jur.*, § 730; 2 *Story's Eq. Jur.*, § 845.

If any real ground of apprehension of danger appeared upon the face of the pleadings, and was admitted or supported by evidence, the court would require the security. I shall declare upon the case as it now stands before me, that the

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executors are authorized to pay over the money to the first legatee without security.

If the danger of loss really exist, or if it should hereafter arise, the determination of this case will not prevent an order for security upon the application of the party interested.

THE MORRIS CANAL AND BANKING COMPANY vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and others.

1. To entitle a party to an injunction, his title to the property and rights claimed by him, and for the protection of which he asks the interposition of the court, must appear in a clear and satisfactory manner.
2. The making and filing of the survey required by the 5th section of the act incorporating the "Morris Canal and Banking Company," (*Pamph. L., 1824, p. 160.*) is a necessary prerequisite to the taking of any lands under the powers given by the charter.
3. It is an established rule in the exposition of statutes, that the intention of the legislature is to be derived from a view of the whole, and of every part of the statute taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. When words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion.
4. As a rule of construction, the legislature ought to be considered as intending to grant, by a charter of incorporation, such powers only as are necessary or useful to the end or object which they had in view in creating the corporation. They ought not to be understood as granting anything more, unless the intention to do so is plainly expressed, or beyond a doubt.
5. In public grants the grantee can take nothing not clearly given him by the grant. In cases of doubt, the grant is construed in favor of the state, and most strongly against the grantee.
6. The third section of the "act to incorporate the Associates of the Jersey Company," (*Pamph. L., 1804, p. 370.*) enacts as follows: "That the said Associates shall have the privilege of erecting or building any docks, wharves, and piers, opposite to, and adjoining the said premises in Hudson river, and the bays thereof, as far as they may deem it necessary for the improvement of the said premises, or the benefit of commerce, and to appropriate the same to their own use." *Held*, that this section merely gave the Associates a privilege or license to build docks, wharves, and piers, in the

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waters of the Hudson river, and the bays aforesaid, in the manner therein mentioned, and when so built, to appropriate them to their own use, and conferred upon them no power to transfer or convey such privilege or license to any other corporation. *Held further*, that the land not so occupied and built upon was not granted to the Associates, and that the same and all rights in and over it remain in the state as before.

7. This court will not interpose by injunction to prevent an apprehended injury, which is not irreparable, and which is capable of compensation in damages.

8. An injunction should only be issued in cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, and the injury be impending or threatened, so as to be averted only by the protecting, preventive process of injunction.

Upon the filing of the bill in this cause, an order was made that the defendants show cause why an injunction should not issue according to the prayer of the bill, and granting a temporary injunction in the meantime. The defendants filed their answers, and affidavits were taken, under an order of the court, to be read upon the argument of the rule to show cause. The cause was heard, by direction of the Chancellor, before James Wilson, esquire, one of the masters of the court, upon the rule, upon the bill, answers, and affidavits.

I. W. Scudder and Zabriskie, for complainants.

Browning and Williamson, for defendants.

THE MASTER. The complainants, by their bill, set forth that under their charter and the supplements thereto, they constructed their canal from the waters of the Delaware to the waters of the Hudson, and that, in its easternmost section, it crosses the Hackensack river and Mill creek, and that the same are navigable streams. That the canal, from the Hackensack on the west to the Hudson on the east, is fed and supplied with water by the tide waters of New York bay, at a place called Fiddler's Elbow, and by the tide waters which flow up from Hudson river or New York bay into Mill creek, and also by the tide waters of Hudson river, where the canal terminates. That said easternmost section has not, since its

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construction, had any other feeders than the tide waters of the Hackensack, the tide waters of New York bay at Fiddler's Elbow, the tide waters of Mill creek, and the tide waters of the Hudson; and that all of said feeders are essential to the navigation of the canal in its easternmost section. That Mill creek, in its main course, runs in a southerly direction, and empties into Hudson river or Communipaw bay, and is crossed by the canal, about four hundred and fifty yards from its mouth, and that the creek is navigable from its mouth to the place where it is crossed by the canal. That the complainants have made an outlet in the canal at Mill creek, and the same has been used to pass boats to and from the Hudson. That between Beach and Henderson streets, in Jersey City, there is a space of about five hundred and fifty feet, where the southerly bank of the canal is washed^w by the tide waters of Communipaw bay, and where boats carrying freight on the canal can discharge their cargoes, and from which bank such cargoes can be re-shipped into vessels navigating said river or bay. That the complainants have the right of navigation to and from the bank of their canal, between Beach and Henderson streets, to the open waters of Hudson river, and that they have title to lands under water between said streets and south of their canal, as far south as South street, which is also under water. That they are riparian owners for the space of about five hundred and fifty feet between Beach and Henderson streets, and thereby have access to the Hudson river and the bays thereof. That from the line of Henderson street to the old boundary ditch of the Associates of the Jersey Company, a distance of about nine hundred feet, the canal was constructed in the waters of Hudson river and Communipaw bay, and that its embankment is now washed by the said waters at low tide. That the complainants own in fee the lands and lands under water, lying northerly of and next adjoining to said canal, and between Henderson street on the west, and the easterly side of said ditch, including lands in that space lying

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upon and along the original high water line of Communipaw bay. And the conveyances or muniments of title under which the complainants claim the property and rights aforesaid, are stated or referred to in the bill.

The bill further states, that within the present limits of Jersey City is a tract of land formerly called Powles' Hook, which was formerly owned by "The Associates of the Jersey Company," and that said Associates had, by their charter, a right of property in the lands under water adjoining Powles' Hook, in the Hudson river, Communipaw bay, and Harsimus bay, and a right to build docks, wharves, and piers, opposite to and adjoining said premises, and that they conveyed all their said lands under water, and their said right, to the complainants, by deeds and conveyances mentioned in the bill. That finding that they needed further dock or basin room for the accommodation of their business, the complainants constructed, between the month of October, 1859, and the month of October, 1860, a dock or basin on the land under water so by them acquired of said Associates. That said basin was constructed on the southerly side of Jersey City and adjoining the same, and in the waters of Hudson river or Communipaw bay, by sinking crib-work filled with stone and earth; said basin being about nine hundred feet in width and about eighteen hundred and fifty feet long on the easterly side, and about sixteen hundred and fifty feet long on the westerly side. That they constructed the same under the titles acquired in the manner stated in their bill, and under the powers given by their charter and the supplements thereto, and under the express authority given by the said Associates, and lawfully transferred to the complainants.

The bill further states, that the Central Railroad of New Jersey have located the route of a railroad which they intend to construct, and that said route in its course enters Communipaw bay, and extends through the waters thereof, and crosses the southern part of said basin, and that the company have commenced making, and intend to complete,

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in the said waters on the line of said route, a solid embankment or bulkhead, and that the execution of the plan of the railroad company will destroy the basin of the complainants, and will destroy Mill creek as a feeder, will deprive the complainants of their rights as riparian owners, will shut off all navigation within the northerly part of Communipaw bay, render access to a large portion of the bank of their canal impossible, and will work irreparable injury to the complainants. That the railroad company claim that they are authorized to construct their road and said embankment under a supplement to their charter, whereas the complainants insist that said supplement gives said company power to construct the same only to the said bay and no further, and does not authorize them to construct said embankment in the waters of the bay. That the railroad company deny the complainants' right to the basin, and are about to occupy a part of it as aforesaid, and destroy their other rights without making them compensation, and that they and the Mayor and Common Council of Jersey City are corruptly combining to injure the complainants by the means before stated.

An injunction is, therefore, prayed for, to restrain the defendants from constructing said embankment or bulkhead, or doing any other injury to said basin, and the complainants' said other property and rights.

The answer of the railroad company admits the existence of some, but not all the deeds and conveyances set forth by the bill, but denies that they have the effect claimed in the bill, and denies that the feeder at Mill creek is essential to the canal, and states that the outlet from the canal to the creek has been but very lately constructed, and is of little value, and was constructed only to make out a case against the defendants, to obtain an injunction; and also that the complainants have a steam pump at the Hackensack river, which furnishes an important part of the water to the canal.

The answer also denies some of the rights claimed by the bill, west of the old boundary ditch, and also denies that the complainants had any right to construct said basin, and

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charges that the same is a great obstruction to navigation, and is a nuisance and ought to be abated.

The answer further states, that the railroad company are the owners of a railroad extending from Phillipsburg to Elizabethtown Point, in the construction of which about six millions of dollars have been expended. That it is one of the main avenues for the transportation of coal from the mines of Pennsylvania, and of other merchandise to New York, and also one of the main avenues of trade between New York and the south and west. That, by a supplement to their charter, they are authorized to extend their road from Elizabeth City to New York bay, at some point at or south of Jersey City, and that, for the purpose of making such extension, they have purchased the right of way across the main land, and have also purchased, to a large extent, the rights of shore owners upon Communipaw bay. That, having filed a survey of their route, they commenced nearly a year ago to bridge Newark bay, and that they have expended a very large sum of money upon their extension. That in the purchase of the rights of the shore owners upon Communipaw bay alone, they have expended the sum of one hundred and eighty thousand dollars. And that the temporary injunction granted in this cause has already most injuriously interrupted their business operations, and interfered with and deranged their contracts with other companies, and with persons who had undertaken the construction of their road.

The answer admits that the defendants intend to construct a solid embankment in the waters of Communipaw bay, and insists that, under the supplement to their charter authorizing the extension of their road, they have the right to do so. They insist that the basin of the complainants, being a nuisance, ought to be abated, and that, if the crib-work which forms the enclosure is removed, there will be a free and open navigation from Communipaw bay to the Hudson river.

The charges in the bill of a design to speculate are denied, both by the company and by John Taylor Johnston, their ~~att~~

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president, who joined in their answer. The charges of combination with the Mayor and Common Council of Jersey City are also denied.

The Mayor and Common Council have also filed an answer, denying the combination between them and the railroad company, charged in the bill.

Upon the filing of the bill, an order was made that the defendants show cause why an injunction should not issue, according to the prayer of the bill, and granting a temporary injunction in the meantime. The defendants filed their answers, and, under an order made for the purpose, affidavits were taken by the parties, to be read upon the argument of the rule to show cause. The parties, by their respective pleadings and the affidavits so taken, and through the arguments of counsel, have had full opportunity to lay their rights and claims before the court. Upon the matters thus presented, the question, whether a permanent injunction should be granted against the defendants, or not, is now to be considered and decided.

In order to entitle the complainants to the injunction which they seek, it is necessary that their title to the property and rights claimed by them, and for the protection of which they ask the interposition of this court, should be made to appear in a clear and satisfactory manner. This is an established rule in applications of this nature.

In the case of *Outcalt v. Disborough*, 2 *Green's Ch. R.* 216-17, Chancellor Vroom says: "It is a general rule that the party seeking to be protected in the possession or enjoyment of real property, must show a right, and it must be such a right as the court will feel bound to protect, upon his own showing, against the act of the defendant." And he cites *Field v. Jackson*, 2 *Dick.* 599, and *Whitelegg v. Whitelegg*, 1 *Bro. C. C.* 57, in support of this doctrine. I refer further upon this point to *Storm v. Mann*, 4 *Johns. Ch. R.* 21; *Nevitt v. Gillespie*, 1 *Howard (Mississippi) R.* 113; *Price v. Methodist Church*, 4 *Hammond* 547; *Davis v. Leo*, 6 *Vesey* 784-7;

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Smith v. Collyer, 8 Vesey 89; Mayor of Jersey City v. Morris Canal and Banking Co., 1 Beas. 551.

The large basin described in the bill, is an important part of the property claimed by the complainants, and I will consider first the questions arising upon this part of the case.

This basin is constructed in the navigable waters of the Hudson river and Communipaw bay, and is wholly below low water mark. It was built by the complainants between the month of October, 1859, and the month of October, 1860, as stated in their bill. They also state that they constructed it under the titles acquired in the manner set forth in the bill, and "under the powers given by their charter, and the supplements thereto, and under the express authority given by the Associates of the Jersey Company, and lawfully transferred to the complainants."

Let us, then, inquire what are the powers given by the complainants' charter and the supplements thereto, for this purpose. By the fifth section of the charter, they are authorized to construct a canal or artificial navigation to connect the waters of the Delaware with the waters of the Passaic, "with all the locks, works, devices, wharves, toll-houses, and offices, necessary for the use of the said canal." And also by themselves and their agents to enter upon and survey all lands, for the purpose of surveying the route of their canal, and locating the several works above specified. And it is declared by the same section, that when the said route "shall have been fixed upon, and its several works located by the president and directors, or a majority of them, and a survey thereof deposited in the office of the secretary of state, then it may be lawful for them and for any agent, superintendent, engineer, contractor, or any person or persons employed in the service of said corporation, at any time to enter upon, take possession of, and use all and singular such lands, water, and streams, subject to such compensation to be made therefor, as is hereafter directed."

The supplement of 28th January, 1828, authorized the company to extend their canal to the Hudson, but does not

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give any further powers for the purposes above stated, than those mentioned in the fifth section of the charter.

It is stated in the answer, and upon the argument was admitted by the complainants' counsel, that no survey of the place where the basin is constructed was ever made or deposited in the office of the secretary of state, in conformity with the requirements of this section. The making and filing of such survey is a necessary prerequisite to the taking of any lands under the powers given by their charter. *Bonaparte v. Camden and Amboy R. R. Co., Baldwin's R.* 205; *Doughty v. Somerville and Easton R. R. Co.*, 1 Zab. 442.

I did not understand the complainants' counsel to deny the correctness of this position. The complainants, therefore, not having filed the required survey, could not lawfully construct this basin by virtue of their charter, if they acted under that alone, and without further authority and right.

But they insist that they had further authority and right. They say that docks or basins are comprised in the "works and devices" which, by their charter, they are authorized to make, and that under and by virtue of the conveyances from "The Associates of the Jersey Company," set forth in their bill, they, the complainants, became the owners in fee of the lands under water, now occupied and enclosed by this basin; or that, if said conveyances did not convey the fee in said lands, they transferred to the complainants a right and authority to construct docks, wharves, and piers, in said waters, and that, by virtue of the title or right so derived from the associates, in connection with the powers given by their charter, as aforesaid, they had full power to construct said basin, and appropriate it to their own use. The title or right which it is contended the Associates thus transferred to the complainants, it is insisted the Associates had and held, under and by virtue of their charter. They were incorporated by an act of the legislature, passed 10th November, 1804. It will be necessary, therefore, now to examine that statute, in order to see what rights it gave to the Associates.

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"It is an established rule in the exposition of statutes," says Chancellor Kent, "that the intention of the legislature is to be derived from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. * * * * When words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion." 1 *Kent's Com.* 461-2.

Chief Justice Marshall, in speaking of the proper means of arriving at the true meaning of a statute, says: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived, and in such case, *the title* claims a degree of notice, and will have its due share of consideration." *United States v. Fisher*, 2 *Cranch* 386.

The title of this act is "an act to incorporate the Associates of the Jersey Company."

In the preamble it is set forth, that it has been represented to the legislature, that Richard Varick and others have become proprietors, by purchase from Cornelius Van Vorst, of a certain tract of land and premises therein described, called Powles' Hook, with a ferry right, and that they had divided it into one thousand shares, and that they had, by agreement, associated and become associates with divers other persons in said shares, and that said associates had petitioned the legislature for an act of incorporation.

By the first section, the said Richard Varick, and the said other persons interested with him in said shares, are constituted a body corporate, with powers to sue, &c., and are declared to be capable, by their corporate name, to have and hold lands, tenements, and hereditaments. But it is expressly provided and declared, in and by said section, that the lands, tenements, and hereditaments which it should be lawful to the said corporation to hold, should *only* be the said tract.

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land and premises, with the privileges and appurtenances in said act before described, and such other lands as they might take in payment or security for debts.

The second section gives the said corporation "power to lay out streets and squares on said tract, and to establish such as had already been laid out, and to regulate the same, and to direct and govern the leveling, pitching, and constructing of the said streets, and the raising and leveling of all lots and grounds for buildings, as well public as private, and to order and regulate the building of all docks, piers, and wharves, and all store-houses and buildings thereon, and to make by-laws, ordinances, and regulations, touching all the said matters, and to enforce the same by penalty." But the powers conferred by this section, it is declared, shall cease whenever the legislature shall institute another corporation for those purposes.

The third section enacts as follows: "That the said Associates shall have the privilege of erecting or building any docks, wharves, and piers, opposite to and adjoining the said premises in Hudson river and the bays thereof, as far as they may deem it necessary for the improvement of the said premises, or the benefit of commerce, and to appropriate the same to their own use."

The eighth section directs that the clerk of Bergen county shall appoint a deputy, who shall be sworn as such, and reside and keep an office within the district of country formerly known by the name of the Island of Harsimus, and which includes Powles' Hook, who shall keep proper books for the recording of all deeds, mortgages, and writings which might thereafter be made or executed, relating to real estate within said district.

The tenth section declares that all sales at auction, to be made at Powles' Hook and the said island of Harsimus, shall be free from any duty imposed by this state, for the period of fourteen years from the passing of said act. These are the parts of the act which relate more particularly to the object of our present inquiry.

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We see, therefore, from these provisions, that the persons named in the act are incorporated by it, and that the tract of land and premises, to wit, Powles' Hook, which they before held and owned as individuals, they are made capable of holding and owning as a body corporate; and that they are not permitted to hold any other lands, except such as they might take in payment or security for debts; and that they are empowered to exercise, for a limited time only, the municipal powers mentioned in the second section. We see, also, that certain privileges and benefits are, by the eighth and tenth sections, secured to the inhabitants of Powles' Hook, and are extended to their neighbors upon other parts of the island of Harsimus.

The object and intention of the legislature in passing this act, so far as they can be gathered from the act itself, seem to have been to enable the corporation thereby created, to lay out and improve the said tract known as Powles' Hook, and prepare the same for settlement as a town or city, and to invite and encourage persons to settle and build there. And the powers granted seem to be limited so as to apply to that place only, and to be used for that purpose and no other. The corporation is authorized to hold that tract, and no other land, save such as they might take in payment or security for debts. The powers granted by the second section are to be exercised in and over that place, and no other, and are to cease upon the happening of the event named. The privilege granted by the third section, to build docks, wharves, and piers in the waters there named, specifies that they may be built as far out as the said Associates may deem necessary for *the improvement of said premises*, or the benefit of commerce. The object and intention of the legislature, as thus understood, in passing this act, should be borne in mind and have their due influence, in examining the different parts of the act to ascertain their true meaning.

It is insisted by the complainants, that by the third section, the fee simple in all the lands under water in Hudson river, Communipaw bay, and Harsimus bay, opposite to and —

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adjoining Powles' Hook, as far out as the right of the state extended, was granted to the Associates, or that the right to build docks, wharves, and piers in the waters of said river and bays was thereby granted, and that such right was an incorporeal hereditament in gross, and that the Associates had a right to convey, and did convey such fee simple or right to the complainants.

On the part of the defendants, it is insisted that the privilege granted by the said third section to the Associates, was only a privilege or license to build said docks, wharves, and piers, and appropriate them to their own use, and that they could not convey or transfer the said privilege to the complainants or to any other corporation.

When we take into consideration the extent and value of those lands under water, their situation in relation to our own state and to the city of New York, with its extensive and valuable trade and commerce, and forming, as those waters do, an important part of the harbor of New York, the best, not only in this country but upon this continent, it is most reasonable to conclude that, if the legislature intended to grant and convey the fee in said lands, or such right over them as is contended for by the complainants, that their intention would be made plainly to appear, and that the grant itself would be made in clear, direct, and explicit terms.

What has been done in other cases of grant of lands by legislative act in this state?

It is said by Judge Elmer, in the case of *Bell v. Gough*, 3 *Zub.* 667, that "but three cases of distinct grants of land covered with water, or of the shore, by the legislature, are to be found in our statute books," referring to the grant of the Pea Patch to Henry Gale, by the act of 24th November, 1831, *Pamph. L.* 15; the grant to Nathaniel Budd, by act of 8th November, 1836, *Pamph. L.* 13; and the grant to Aaron Oglen, by act of 25th January, 1837, *Pamph. L.* 64.

In the Pea Patch grant, the language of the act is, that "all the right and title of the said state of New Jersey to the said island called the Pea Patch, with all and singular the

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appurtenances, be and the same are hereby granted and conveyed to the said Henry Gale, his heirs and assigns forever; and that the same shall forever hereafter be vested in the said Henry Gale, his heirs and assigns, in as full and ample a manner as the state of New Jersey hath right and title to grant the same," reserving, however, the state's right of jurisdiction and sovereignty. The language in the grant to Budd is the same, and in that to Ogden is equally clear.

The language used in these three acts, leaves no doubt in regard to the intention of the legislature, or the nature and extent of the estate granted. Compare this with the language of the third section of the charter of the Associates. The difference is striking. The grant of the Pea Patch declares that "*all the right and title*" of the state to the same, "*are hereby granted and conveyed to the said Henry Gale, his heirs and assigns forever, and that the same shall forever hereafter be vested in the said Henry Gale, his heirs and assigns;*" &c.

The third section of the Associates' charter declares that "*they shall have the privilege to build docks, wharves, and piers,*" &c., and "*to appropriate the same to their own use.*" The words "grant," "convey," "right," "title," "estate," are none of them found in it. Not only is the language of this third section different from that used in those grants, but it is also wholly unlike that uniformly used in a deed intended to convey a fee simple, or such right as the complainants are contending for. No discreet conveyancer would use such language in such a deed. It would not be deemed either apt or adequate for the purpose. And when a grant of an estate in fee, in lands so extensive and valuable, or a grant of so important a right over them as is argued for by the complainants, is intended to be made by the state, by means of an act of the legislature, passed with all the formalities and deliberation attendant upon legislation, is it ~~not~~ reasonable to suppose that they would employ language at least as plain, explicit, and direct, as that which is deemed

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appropriate and necessary in an ordinary deed between individuals?

Again: This third section declares that the Associates shall have the privilege of building docks, wharves, and piers in those waters, and to appropriate the same, that is, the docks, wharves, and piers, to their own use. Can this properly be said to grant *all* those lands under water upon which the Associates did *not* build any dock, wharf, or pier? If it was intended by the legislature to grant *the whole* of those lands, or a right for ever over *the whole* of them, whether so built upon or not, why was this section so framed and expressed as to declare in effect, that when they built a dock, wharf, or pier upon any particular *part* or *portion*, they might appropriate the same to their own use? Is the giving of a privilege to occupy and build upon, and then to appropriate *a part* of certain lands, a *grant* or *conveyance* of the *whole* of those lands? Does not this section, by giving to the Associates a privilege of building and appropriating to their own use, docks, wharves, and piers, which must of necessity be built upon *parts* and *portions* of those lands under water, selected from time to time, exclude the idea that the legislature meant to grant *the whole* of said lands? Is it not really an indirect declaration, that the land not so occupied and built upon was *not* granted, and that the same, and all right in it, and over it, remained in the state as before?

Would such construction of this section as is contended for by the complainants, be in accordance with the intention of the legislature in passing this act, or in harmony with the other parts of the act? It seems to have been intended to restrict the powers of the Associates within narrow limits. They are incorporated by the first section, and enabled to hold lands, &c. The powers given by the second section were to last but for a time, and when they ceased, little else but the power to hold Powles' Hook and improve it, remained in the Associates, except what is given by the third section. The first section, moreover, expressly provides that

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the lands, tenements, and hereditaments which they should be capable of holding, should be *only* those therein before described. Would the legislature, after thus restricting the powers of this corporation, and after expressly declaring that they should not be capable of holding any other lands, tenements, or hereditaments than those mentioned in the first section, proceed at once in the third section to grant to them those extensive and valuable lands under water in fee simple, or such incorporeal hereditament in or over them as is contended for by the complainants? The two sections as thus construed would conflict with each other.

Again: The privilege given by the third section to the Associates, is to build docks, &c., in those waters, as far out as *they* may deem necessary for the improvement of the said premises, or the benefit of commerce. Here it is left *to them* to judge and decide in this matter. They were the owners of Powles' Hook, and as such were incorporated with powers to hold and improve it, with the view of building up a town. And as they, as a corporation, were to own no other lands, and could have no object or interest different from this, such right to build docks, wharves, and piers, might safely be vested in them, to be used according to their judgment. They could have no motive to use this privilege for any other purpose, and it was granted to them in furtherance of the object and intent of the act. But if the right or privilege granted by this section, were such as is contended for by the complainants, the Associates might not only use it themselves, but might sell and convey it away, or it might be sold against their will, by virtue of judgment and execution against them, and might thus pass into the hands of unfriendly individuals, or of a corporation created for other purposes, and having interests in conflict with, or hostile to the interests of the community or town of Powles' Hook. And thus what was granted by the legislature for their benefit, might be used for their injury or destruction. The legislature might well be willing to grant such a privilege to the Associates in such manner as to be used ~~by~~

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them and according to *their* judgment, for the building up of Powles' Hook and the encouragement of its trade and commerce, but unwilling to grant them an estate or right which might pass into other hands, and be used for very different and perhaps contrary purposes.

Moreover, the provisions of this third section seem not to be the main purpose of the act, but merely auxiliary thereto. I think it is right, as a rule of construction, to consider the legislature as intending by this section to grant such powers as were necessary or useful to the end or object which they had in view in creating this corporation, and that they ought not to be understood as giving or granting anything more, unless their intention to do so is declared or made known in the plainest terms, leaving no possible room for doubt. Here, if the third section is construed to give to the Associates only a *privilege* or *license* to build docks, &c., to be exercised by themselves, and not transferable, it gives all that is necessary or useful in that respect, to enable the corporation to accomplish the ends for which it was created. But if it is construed to grant a fee, or such right as the complainants contend for, it grants more than is necessary or useful for that purpose. We must therefore conclude that they did not intend to grant so much, since the language used cannot be said to have, beyond all doubt and controversy, the meaning contended for by the complainants. If the Associates had, by that section, a privilege or license to build, &c., to be used and exercised by themselves, they could build docks, wharves, and piers, as far out as they might deem necessary for the improvement of Powles' Hook, or the benefit of commerce. If they had a fee in the lands, or a right over all of them, capable of being transferred and conveyed away, they could do no more, except that they might sell such estate or right, which, so far from being a benefit to Powles' Hook, might be the means of great injury and mischief.

Again, look at the title of this act. It is "an act to incorporate the Associates of the Jersey Company." In this, brief and simple as it is, we find nothing to indicate that the

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legislature intended to grant any great or unusual rights or powers.

But if, notwithstanding the considerations already mentioned, the meaning of this third section should still seem to be doubtful, there are other principles which may assist us in arriving at a correct conclusion.

It is a well settled rule of construction in regard to a public grant, that the grantee can take nothing not clearly given him by the grant. In cases of doubt, the grant is construed in favor of the state, and most strongly against the grantee. *United States v. Arredondo*, 6 Peters 738-9; *Charles River Bridge v. Warren Bridge*, 11 Peters 545; *State v. Bentley*, 3 Zab. 538; *Proprietors of Bridges, &c., v. Hoboken Land and Improvement Co.*, 2 Beas. 94; *Townsend v. Brown*, 4 Zab. 87.

In this last case, Chief Justice Green says:

"It is a rule of construction, no less wise than clear, that in all cases of public grants, the interpretation shall be most favorable to the public, and most strongly against the grantee. The rule is founded in wisdom. All experience teaches that public rights are yielded to private interests with sufficient alacrity. If the legislature really design to grant to individuals the right of several fishery, below low water mark, it is easy to do so in plain and express terms. It is far better that the right should be settled by legislative interference, than that public rights should be frittered away by the aid of judicial construction."

It was further said by the counsel for the complainants, that the construction of this third section had been settled in their favor by the decisions in the cases of *Den v. Dummer*, Spencer's R. 86, and *The Associates v. Jersey City*, 4 Halst. Ch. R. 715, in which, as they insist, the court held that the Associates owned all this land under water, opposite to an adjoining Powles' Hook, to the middle of Hudson river, Communipaw bay, and Harsimus bay. But I do not so understand it. It was not necessary for the court to decide that question.

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in either of those cases, and I do not think that they have done so.

I am not able to see, either from the language of the third section of the charter of the Associates, or from the other parts of the act, or from the whole act taken and considered together, and the object and intention of the legislature in passing it, that that section has the meaning and effect contended for by the counsel of the complainants. I am of opinion that it gives to the Associates merely a privilege or license to build docks, wharves, and piers, in the waters of the Hudson river, and the bays aforesaid, in the manner there mentioned, and when so built, to appropriate them to their own use ; and that the Associates could not transfer or convey such privilege or license to any other corporation.

The complainants' counsel upon the argument, claimed further, however, that they had a right, as riparian owners, to construct this basin. I do not perceive that this is so. South street, one of the streets laid down upon Mangin's map, a map made or adopted by the Associates, and which street is one hundred feet wide, lies immediately north of the basin, and between it and the lands of the complainants. It has been decided that the streets upon Mangin's map are dedicated to public use, and that though the fee in them remained in the Associates, it was nevertheless subject to the public easement created by such dedication. *Den. v. Dummer, Spencer's R. 86; Mayor, &c., of Jersey City v. Morris Canal and Banking Co.*, 1 *Bcas.* 547.

The complainants' counsel seemed to attach some importance to the fact, that a portion of the northerly side of South street is occupied by the pier built by the complainants upon the southerly side of their smaller basin. But according to the decision in the case just cited from 1 *Bcas.* 547, the complainants did not thereby acquire any exclusive right to the part of the street so occupied. It still remained a public street, and the right of the public, and of all persons who were before entitled to use it as such, was as perfect and complete as before.

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Even if the Associates had conveyed to the complainants all their right and title in South street, and they thereby became in law riparian owners, yet an important question would still remain to be settled, as to what rights belonged to them as riparian owners, they being an incorporated company, and having only limited powers under their charter. That question came up in the case of *The State v. Brown, 3 Dutcher*, 13, and the Chief Justice, in delivering the opinion of the court, expressly declined giving an opinion upon it. It may therefore be considered at least a doubtful point. But I do not find that South street ever was conveyed to the complainants. It is not included in the bounds or description of the deed from the Associates, dated 2nd January, 1845, or that dated 13th September, 1845, as the same are stated and set forth in the bill, nor in any other conveyance which has come to my notice.

I am of opinion that the complainants have not shown any sufficient authority in themselves to construct the said basin, or that they have a good and sufficient title thereto. And that, therefore, this court upon well established principles, which regulate its practice and proceedings, ought not to grant an injunction to protect them in the enjoyment thereof.

It was urged by the counsel for the complainants, that in ease the complainants' title should not be made out to the satisfaction of the court, that the temporary injunction should be allowed to stand until that question could be tried at law. In some cases, this court will hesitate to decide upon a question of title on an application for an injunction. But the proper course to be pursued, will always depend much upon the circumstances of each particular case. On the present application the title claimed by the complainants, and the grounds upon which it is believed by them to rest, have all been laid before the court, and the material facts in regard to it are not disputed. I speak now of their claim to the basin.

The injunction prayed for would suspend an importa ~~m~~ work of a public nature, and do a great and daily recurri ~~ng~~

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injury to the stockholders, whose capital to a large amount is invested in it. The court must take care, when called upon to interpose to prevent an apprehended injury to one party, not to do at least as great an injury to the other. I think that, under the circumstances of this case, it would not be just to tie up the defendants by injunction, until the question of title could be tried at law.

The other rights and property claimed by the complainants, and for which they seek protection by injunction, are the right to use the tide waters of Mill creek, for the purpose of feeding their canal by means of the feeder constructed there; also the right to use the creek as an outlet to their canal, and the right of navigating the waters of the creek and of Communipaw bay; also, the rights of adjacency to the waters of said bay, where said waters wash the bank of the canal; also, the right of riparian owners upon the shores of said bay, and the right of passing over the waters thereof, to and from their canal, and of loading and unloading boats on the banks thereof. They also claim to own lands under water between Beach and Henderson streets, under a deed from Cornelius Van Vorst. But their title to those lands is denied by the defendants, and no deed from Van Vorst was produced, nor was any evidence offered in regard to it. The complainants' counsel say that there has been such a deed, but that it is now lost.

The canal company were, by their charter, authorized to construct their canal from the Delaware to the Passaic. By a supplement passed twenty-eighth January, 1828, they were empowered to extend it to the Hudson. This extension was constructed in the year 1836, as appears by the bill, and it crosses the Hackensack river and Mill creek. Mr. Talcott, who now is, and since the spring of 1846 has been, chief engineer of the canal company, says, that when he first took charge of the canal, the structure upon which the canal had before crossed Mill creek was washed away. That afterwards new fixtures were made for the purpose, under his superintendence and direction, and in describing them, he says that "they

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consisted of a plain wooden siphon culvert, with an embankment on each side of the canal, over it, entirely excluding the waters of Mill creek." He further says, that they got the canal in navigable order in 1850, and that the through trade commenced in 1851, though some light boats were passed through before. There was no feeder at Mill creek at that time, and the canal continued to be used without any feeder there until 1854-5, or 1855-6. An alteration was then made, and the present feeder was constructed by placing a tide gate in the fixture at the creek.

It is not expressly stated, but, from the evidence, I think it is to be inferred that there was no feeder at the creek in the original structure there, which was washed away before Mr. Talcott took charge of the works in 1846. It appears that though the company after that date, proceeded to put that section of the canal in order for trade and business, and spent large sums of money for that purpose ; and though a new structure was then, under the superintendence of their chief engineer, built at the creek, for the canal to cross the creek upon, yet that it was so built as entirely to exclude the waters of the creek from the canal, and that the canal continued to be used without any feeder there, for the space of four or five years from that time. These facts in the history of the canal are some evidence, that though a feeder there may be valuable, it has not always been deemed indispensable to the use and operation of the canal.

The canal now has four feeders by which it is fed from the tide waters, to wit, one at Hackensack river, one at Fiddler's Elbow, one at the Hudson, and this one at Mill creek. These four feeders, together with a steam pump at the Hackensack, are the means by which the canal is now supplied with water. This pump is only used occasionally. Whenever, by reason of the low state of the tides, the four feeders do not afford sufficient water, the pump is used to make up the deficiency, and there is no evidence that it has not at all times been found sufficient for this purpose.

There is no doubt that the feeder at Mill creek is a val-

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able addition to the complainants' means of supplying their canal with water, and that it would be an injury to them to be deprived of it. But I do not think that it could properly be considered an irreparable injury. The past history of the canal shows that this feeder is not indispensable. There are times (always recurring when neap tides prevail) when this feeder does not supply the canal with any water at all. On such occasions the pump furnishes all that is needed, in addition to what may come in at the other feeders, and the navigation of the canal continues without interruption. Any injury which might be done to this feeder by the operations of the defendants, would be I think capable of compensation in damages, and the ability of the defendants to respond in that way is not questioned.

The complainants claim a right to have an outlet from their canal into and through Mill creek. Yet no outlet there was ever made until some time in July and August last, and a very short time before the filing of their bill in this cause. It was then made in a very imperfect manner, and but one boat, and that an empty one, has ever been passed through it. The complainants themselves do not appear ever to have placed much value upon this right.

The rights of adjacency to the waters of Communipaw bay where the same wash the bank of their canal, the right of riparian owners, the right of navigating those waters and the waters of Mill creek, and the right to the lands under water between Beach and Henderson streets, claimed by the complainants, are not all admitted by the defendants, and some of them are expressly denied.

But if it be conceded that all these rights belong to the complainants, yet I cannot think that the injury apprehended to them from the proceedings of the defendants can be properly called irreparable, or that it is of such a character as to call for the interposition of this court by injunction.

The water along the canal where its bank is washed by the waters of Communipaw bay, and also at the mouth of Mill creek, is shallow at ordinary tides. The right of navi-

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gating those waters is not exclusively in the complainants; they can claim it only in common with others. It does not appear that the complainants have ever used the bank of their canal, where the same is washed by the waters of Communipaw bay, for the loading or unloading of boats, or that they expect or intend to do so. So far as relates, therefore, to these further rights claimed by the complainants, I am of opinion that, even if the complainants should suffer all the injury which they apprehend from the proceedings of the defendants, such injury could be fully compensated in damages, and that no injunction should be granted in regard to them.

I may here adopt, as applicable to this case, the language of a learned judge, and say: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or which is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless to cases of great injury, where the courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, and the injury be impending or threatened, so as to be averted only by the protecting, preventive process of injunction. But that will not be awarded in doubtful cases, or new ones not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, and not of the party who pray for it." *Bonaparte v. Camden and Amboy R. R. Co., Baldwin's R.* 217, 218.

Other questions, interesting in themselves, and having a important bearing upon this case in certain of its aspects were presented, and most ably discussed by counsel upon the argument. But under the views which I have already expressed, it is not necessary that I should consider or decide them.

I am of opinion, upon the whole case, that the motion for a permanent injunction should be denied, and the tempo-

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injunction dissolved as against all the defendants, with costs, and I do respectfully advise the Chancellor to make an order accordingly.

**THE MORRIS CANAL AND BANKING COMPANY vs. FRANCIS O.
MATTHIESON and others.**

**SAME COMPLAINANTS vs. FRANCES O. MATTHIESON AND
JOSEPH H. GAUTIER and others.**

Upon filing the bill an injunction issued pursuant to the prayer thereof. The defendants having answered, now move to dissolve the injunction. The cause was heard before James Wilson, esquire, one of the masters of the court, upon the bill and answer.

Gilchrist and *Bradley*, for the defendants, in support of the motion.

I. W. Scudder and *Zabriskie*, for the complainants, contra.

THE MASTER. The bill in each of these cases, sets forth that the complainants have constructed, under a certain right and title therein stated, a basin in the waters of Communipaw bay and Hudson river, by sinking crib-work filled with stones, and that the crib-work forming the southerly side of said basin, was extended westwardly outside of said basin, about 134 feet; and that in May last, in order to construct a dock or pier there, to accommodate the business of their canal, they extended said crib-work about 250 feet further westwardly, making in all about 384 feet of crib-work from the southwesterly corner of the basin. The bill charges that the defendants were engaged in taking up and destroying said crib-work, and threatened to destroy the basin, and that thereby an irreparable injury will be done to

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the complainants. The bill prayed for an injunction to stay the proceedings of the defendants, which was granted.

The defendants have answered the bill, setting forth that they own valuable lands and real estate in Jersey City, and upon the shores of Communipaw bay, and that they are entitled to the rights of adjacency, the rights of riparian owners, and the rights of navigating the waters of said bay and Hudson river; and that their business which is carried on upon said lands, and is large and valuable, makes it necessary for them to pass frequently with vessels across said waters, to and from New York. They deny the right of the complainants to construct said basin and crib-work, and allege that they are public nuisances, and also that they work especial injury to their business. They admit that they were engaged in taking up said crib-work, and insist that they had a right to do so, but deny that they did any injury to the basin. The defendants now move to dissolve the injunction.

The basin and the crib-work, extending westwardly from its southwesterly corner, were constructed, and are claimed by the complainants, upon one and the same claim of right and title. I have already considered this claim, so far as relates to the basin, in the opinion just read in the case of these same complainants against the Central Railroad Company of New Jersey and others.* I now refer to that opinion for the sake of convenience, and adopt it here, so far as it is applicable to this case. Upon the reasons there stated, I am of opinion that the complainants have not shown such title to the said crib-work, as entitles them to an injunction to protect them in the enjoyment thereof. Upon this ground I am of opinion that the injunction issued in each of these cases, should be dissolved with costs, and I do respectfully advise the Chancellor to make an order accordingly.

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SIMON WALTER and others *vs.* WILLIAM LIND and others.

A agreed to convey to B a tract of land for \$500. B applied to C for a loan of that amount. C agreed to loan B \$550 upon his giving a mortgage upon the said tract for \$850, with interest at seven per cent. Upon agreement between the parties, A executed a deed to B for the land for the nominal consideration of \$850; B giving A a bond and mortgage for that amount. A assigned the mortgage to C in pursuance of the agreement for \$550; \$50 in cash to be paid to B. Of this amount nothing was actually paid to B. Upon a bill to foreclose, filed by C, to recover the nominal consideration of \$850, *Held*—

1. The transaction, though in form a sale and mortgage for \$850, in reality was a sale and mortgage for \$500.

2. The mortgage was not usurious. It was made for a legitimate purpose, though for a larger amount than was really due. There being no usury in the inception of the contract, no subsequent transaction can render it usurious.

3. The complainants are entitled to the \$500, actually advanced by them to the mortgagee. The contract by which they claim \$350 beyond that amount was usurious, and cannot be enforced. Under such circumstances, the mortgage will be deemed a security for the amount actually advanced.

J. Whitehead, for the complainants.

I. Usury, in the answer of the defendants, Lind and wife, is not pleaded according to the facts of the case.

Usury must be pleaded in accordance with the facts, and the proof must support the plea. *Smith v. Brush*, 8 Johns. R. 84; *Tate v. Wellings*, 3 T. R. 531, Lord Kenyon's opinion, page 538; *Lawrence v. Knies*, 10 Johns. R. 140; *Fulton Bank v. Beach*, 1 Paige 429; *Rowe v. Phillips*, 2 Sandf. Ch. R. 14; *Hetfield v. Newton*, 3 Ibid. 564; *Vroom v. Ditmas*, 4 Paige 526; 8 Paige 452.

II. A security uncontaminated with usury at its inception, is not affected by any subsequent usurious transaction. *Gray v. Fowler*, 1 H. Black. 463; *Pollard v. Scholy*, *Croke Eliz.* 20; *Rex v. Allen*, 1 Mod. 69; *Ballard v. Oddey*, 2 Mod. 307; *Rex v. Sewell*, 7 Mod. 119; *Brown v. Fulsbye*, 4 Leon. 43; *Body v. Tassell*, 3 Leon. 205; *Fussel v. Brooks*, 2 Carr.

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& P. 318; *Pearsall v. Kingsland*, 3 *Edw. Ch. R.* 195; *Bush v. Livingston*, 2 *Caines' Cases in Error* 66; *Ferral v. Shaen*, 1 *Saund.* 295, note 1; *Sloan v. Sommers*, 2 *Green's R.* 510; *Donnington v. Meeker*, 3 *Stockt.* 362.

III. A sale of a promissory note or bond, although for an amount which, if calculated with reference to interest on the principal, would amount to usury, does not vitiate the security. *Donnington v. Meeker*, 3 *Stockt.* 362; *Munn v. Commission Co.*, 15 *Johns. R.* 44.

IV. The transaction which gives rise to the controversy in this cause, amounts to nothing more nor less than a mere change of one security for another.

The deed from Lind to Swift was but a mere mortgage, and it was exchanged for a bond and mortgage.

Lind was the agent of Swift, employed to sell that bond and mortgage. It was, therefore, Swift's act.

It makes no difference to Lind whether Swift still held the deed, or bond and mortgage. He would be equally bound to pay \$850 in either case.

Lind owed Swift \$850, and was bound to pay it. Swift assigned his claim to the complainants; sold it for less than was due on it; but that matters not to Lind.

There was no attempt at evading the usury law. The sale was not made for that purpose.

The value of the land is said to be less than the face of the bond and mortgage. That was an additional inducement to Swift to sell.

V. What is the relief of the complainants? Clearly decree for the whole amount of the bond and mortgage. Because—

1. The entire estate of Swift passed by his transfer; that entire estate was the whole amount of the money principal and interest. If Swift were suing, there would be no question as to his right to recover. The complainants stand in his shoes, and are entitled to his rights.

2. This course can work no damage to Lind or his heirs. They owed Swift \$850, and have never paid it. Th

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it still, and ought in equity to pay it. It can work no damage to Pierson. He received his mortgage with notice of the mortgage of the complainants. Their mortgage was on record. The property was subject to that lien at the time he took his security, and that lien was for a just debt and a legal one.

In the case of *Donnington v. Meeker*, no deduction was made. None should be made here. The defendants have paid nothing upon the mortgage; no reduction has been made by them of the original debt, and no hard or unconscionable bargain driven with them.

E. Schieffner, for the defendants, Lind and wife.

1. On the sale of real estate covered by one or more mortgages, to the mortgagee, the mortgage or mortgages merge in the new deed of conveyance, and become null and void. The former mortgagee and new owner can, at a resale of the real estate in question to the former mortgagor and later conveyor, demand such a price as he thinks a fair equivalent for the real estate he is about to reconvey.

2. A sale by the former mortgagee and later owner of real estate, to a second wife of the former mortgagor and conveyor, which wife never had any interest in said real estate, concludes, if made with the knowledge and privity of other persons, as for instance the assignee of a bond and mortgage covering the real estate in question, any objection on their part that the conveyance to the former mortgagee was not a *bona fide* transaction, and that the said mortgagee never was a *bona fide* owner of the said real estate.

3. All notes, bills, bonds, mortgages, &c., made in the County of Essex, for the payment or delivery of any money loaned, on which a higher interest is reserved or taken than seven per cent., are utterly void. *Nix. Dig.* 401, § 1, 2; *Ibid.* 402, § 8.

4. Whatever form, shape, or disguise, a contract for the loan of money assumes, when the capital is returned, a profit made, or loss imposed, upon the necessities of the borrower

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over the legal rate of interest, will constitute usury. And that usury may be committed by agreeing to take the legal interest on a larger sum than that really loaned. *Ely v. McClung*, 4 *Porter* (Ala.) 128; *Dowdall v. Lenox*, 2 *Edw. Ch. R.* 267; *Flood v. Shamburgh*, 3 *Cond. La. R.* 180.

5. The position of the defendant, Lind, when he negotiated the sale of the new mortgage, not yet drawn or executed, was like that of the maker of an accommodation note, which has been endorsed by somebody else, and on which the maker of the note and real borrower wishes to raise a loan by selling the same at a large discount. Such a transaction is within the statute against usury. *Holeman v. Hobson*, 8 *Humph. (Tenn.)* 127; 3 *Johns. Ch. R.* 395.

Titsworth, for the defendant, Pierson.

THE CHANCELLOR. The bill is filed to foreclose a mortgage given by Lind and wife to Abiel W. Swift, dated June 3d, 1861, for \$850, payable in two years, with interest at seven per cent., payable semi-annually. The defence is that the mortgage was given for a usurious loan. The answer alleges that on the 4th of February, 1861, about four months before the date of the mortgage, the mortgagor purchased the premises of Swift for \$500. That, having applied to the complainants for a loan of that amount, they agreed to lend him \$550 upon his giving them a mortgage for \$850, with interest at seven per cent., to which the mortgagor agreed. That thereupon, and about the 28th of May, 1861, it was agreed between the parties, that Swift should execute a deed for the land, expressing the consideration to be \$850, that Lind and wife should give him a bond and mortgage for that amount which should be assigned by him to the complainants for \$550, and of that sum fifty dollars in cash should be paid to the mortgagor. That in pursuance of this arrangement, on the third of June, a deed was executed by Swift and wife to the wife of Lind, and thereupon the bond and mortgage for \$850 were executed and delivered to Swift, and by him a

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signed to the complainants, and that of the \$50 agreed to be paid to the mortgagor, he received but \$25, the balance having been retained, as they allege, for fees and costs. That this sum of \$25 was paid to the mortgagor about the 23d of August, at which time Swift received \$500, the price of the lot. The answer alleges that the making and delivery of the bond, mortgage, and assignment, were all usurious, and that the consideration moneys mentioned therein were not actually paid, but were so stated and set forth to conceal a fraudulent and usurious transaction. The answer further insists that the bond and mortgage are usurious, because they were made and dated several months before the payment of the money loaned to the mortgagor.

The undisputed facts of the case are, that on the 22nd of May, 1857, William Lind, the mortgagor, being the owner of the mortgaged premises, and being largely indebted, by mortgage and otherwise, to Abiel W. Swift, conveyed the premises in fee, by deed of bargain and sale, to Swift, his creditor, in payment of his debt. The entire indebtedness was \$1250, of which sum \$850 had been secured by mortgage upon the premises. The deed was not given by way of mortgage, or as collateral security. The testimony of Mr. Swift is very express upon this point. In answer to the question whether he considered the deed made to him by Lind anything more than a security for the debt, he answered: "I considered it a *bona fide* sale. I don't consider he owed me anything after he made me the deed."

Lind, in fact, had been many years in the employ of Swift, and had become his debtor for advances made from time to time, to an amount beyond the value of his property. Swift had been an indulgent creditor, and permitted Lind, after the conveyance in payment of the debt, to remain upon the premises. Such being the relation of the parties, Lind still being in embarrassed circumstances, and the fee of the land remaining in Swift, in the year 1861, shortly before the date of this mortgage, Swift agreed to convey the land to the wife of Lind in fee, if he would pay him \$500. To carry out

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that bargain this mortgage was made. Lind, by his answer, states that he applied to these complainants for a loan of \$500, that they agreed to loan, and did loan him that amount of money, and took the mortgage in its present shape as a mere contrivance to cover up the usury. It is admitted that the complainants advanced upon the mortgage but \$550, and for that sum advanced, they hold the defendant's bond and mortgage for \$850, payable in two years, with interest at seven per cent.; an operation by which they realize in two years upon \$550, a bonus of \$342, over and above the legal rate of interest.

But it is urged that this was not a loan of the money from the complainants to the mortgagor, but a sale of the mortgage, and that the defendants had a right to purchase at any rate of discount, without being chargeable with usury. This appears to me a total misapprehension of the true character of the transaction. When the negotiation for this loan was entered upon, Lind was not the debtor of Swift. Swift was the owner of the land which had been conveyed to him by Lind in payment of the debt. He had agreed to reconvey the land to Lind, or, at Lind's request, to Lind's wife, for the sum of \$500. For that amount Lind was desirous to effect a loan. But he had no security to offer till he could get the title. An arrangement is therefore made, by which Swift conveys the land in fee to Lind's wife for the nominal consideration of \$850, and Lind, in return, gave Swift a bond and mortgage upon the premises for that amount, with the understanding that if the mortgagee received \$500, his claim for the land was paid in full.

These papers were placed in the hands of the counsel or agent of all the parties, to raise the money and carry the arrangement into effect. As between the mortgagee and mortgagor, there is no pretence of usury. The mortgagee testifies expressly that he agreed to convey the land for \$500. That was all that was due him, but the mortgage was taken above the sum of \$500 for Lind's benefit, to enable him to reuse the money upon it. All that was realized upon the

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mortgage above that amount belonged to Lind, not to Swift. Swift's interest in the mortgage was limited to \$500. That was all he claimed, and all he received. If the mortgage had been sold for its nominal value, \$850, three hundred and fifty dollars of that amount would in equity have belonged to Lind, and he might have compelled the repayment of the money. To the extent of Swift's interest, the sale was negotiated and made for his benefit, but beyond that amount it was in reality negotiated and made for Lind's own benefit. The loan was, in fact, as the whole transaction shows, negotiated by him, and in reality for his benefit. That this was so understood, is shown by the fact that when the loan for \$550 was effected, \$500 was sent to the mortgagee, and the other \$50 appropriated for the benefit of the mortgagor. How, then, can this be denominated a sale by the mortgagee of the mortgage? Is it not obvious that it was in reality an effort by the mortgagor to raise a loan upon his own mortgage, given to a third party, for an amount beyond the sum really due?

The papers themselves demonstrate that this must of necessity have been the real character of the transaction. The deed from Swift, the bond and mortgage from Lind and wife to Swift, and the assignment from Swift to the complainants, are all dated on the 3d, and acknowledged on the 4th of June, 1861. They are all drawn by the same scrivener, attested by the same witness, and acknowledged before the same master. They are obviously parts of one and the same transaction. The negotiation for the loan must have been entered upon and completed when there was no mortgage in existence, and when the fee of the land was in the mortgagee. These facts demonstrate the truth of the mortgagee's evidence, that he was to receive \$500 for the land, and that the mortgage was made to be assigned for that amount. Beyond that sum the interest was in the mortgagor. As between the complainants and the mortgagor, the transaction was simply this: they loaned him \$550, and took his mortgage for \$850; and of the \$50 loaned, they took \$25 to pay the ex-

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penses of preparing the papers and insuring the property, and appropriated the remaining \$25 to pay a debt alleged to be due from the mortgagor to the brother of one of the mortgagees, who aided the mortgagor in negotiating the loan. The witness, indeed, testifies that the mortgagor promised him the whole \$50 as a compensation for raising the money. A clearer case of usury it is difficult to imagine. To permit such a contract, established by clear testimony, to be enforced in a court of equity, would be a reproach to the administration of justice.

There is nothing in the evidence which can alter the essential character of the transaction. It is unnecessary, therefore, to discuss the credibility, or the competency of the evidence on the part of the complainants.

The complainants' counsel insists that the mortgagor has no ground of complaint, as he is in no wise injured by the transaction. That he gave a mortgage for \$850. That he was indebted in that amount to Swift. That the mortgagee could have recovered the amount due on the face of the mortgage, and that the assignees are entitled to stand in his shoes. That the assignees are entitled to stand in the shoes of the mortgagee is true, but the whole fallacy of the argument consists in the assumption that the mortgagee was entitled to recover the face of the mortgage. Swift was entitled to \$500, and it is clear that the assignees can recover no more. The apparent contradiction in the testimony of the witnesses on this point, is attributable mainly to the fact that they speak sometimes of the form, and sometimes of the substance of the transaction. In form, it was a sale and mortgage for \$850. In reality, it was a sale and mortgage for \$500. The apparent conflict in the testimony on this point, is rendered totally immaterial by the admitted facts that the mortgagee claimed and received but \$500 upon the mortgage.

The bill alleges that the mortgage itself is usurious. This is a mistake; but I do not think the error is fatal. The mode in which the usury was taken is intelligibly stated, and substantially in accordance with the evidence.

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The mortgage, however, was clearly not usurious. It was made for a legitimate purpose, though for a larger amount than was really due. There being no usury in its inception, no subsequent transaction can render it usurious. *Sloan v. Sommers*, 2 *Green's R.* 510; *Donnington v. Meeker*, 3 *Stockt.* 362.

There was due upon it from the mortgagor \$500, which was paid by the complainants to the mortgagee, and which in equity they are entitled to receive. The contract by which they claim to recover \$350 beyond that amount, was usurious and cannot be enforced. Under such circumstances, the mortgage will be deemed a security for the amount actually advanced. *Eagleson v. Shotwell*, 1 *Johns. Ch. R.* 536.

A decree will be made accordingly.

THE RECTOR, CHURCH WARDENS, AND VESTRYMEN OF THE
SWEDISH EVANGELICAL LUTHERAN CHURCH IN THE TOWN
OF SWEDESBOROUGH, NEAR RACCOON CREEK, vs. CHARLES
P. SHIVERS.

1. Where there is uncertainty as to the extent of the responsibility of a party from whom rent is sought to be recovered, a court of equity will maintain jurisdiction of a suit for its recovery.
 2. A bill is not demurrable for want of proper parties, when all the persons whose rights are to be affected by the decree are joined.
 3. A change in the ecclesiastical relation of a church for whose benefit property is held in trust, does not necessarily involve any perversion of the trust, or diversion of the fund from its legitimate purpose.
 4. An objection to a suit that the amount involved is too trivial to justify the court in taking cognizance of it, may be taken advantage of by special motion to dismiss the bill, or the court may of its own motion at the hearing, order the bill to be dismissed.
 5. If a suit have no other object than the mere recovery of a sum of \$1.75, the bill will be dismissed; but if it seeks to establish a right of a permanent and valuable nature, it falls within the recognized exceptions to the general principle, and the court will maintain jurisdiction.
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Kingman, for the defendant, in support of the demurrer. The bill is defective on three grounds.

1. Want of necessary parties.
2. Want of certainty.

3. The complainants have full and complete remedy at law.

The bill is not only defective for want of necessary parties, but it contains irrelevant and impertinent matter. It sets out a great many different conveyances to different parties.

The complainants do not claim any certain amount. They show that the lot in question has been subdivided, and that it is held in three shares, without showing how much is due upon the share held by the defendant.

The bill shows that the complainants have a right to recover at law. The charter gives a right of distress. An action on the case would lie. They may recover in justices' court.

Carpenter, for the complainants, *contra*.

The question involves large interests and a great amount of property. The whole town of Swedesborough is held under ground rents.

The Swedish church have affiliated with Episcopal church. It is now known as Trinity Church of Swedesborough. Under that name it has collected mortgages. The bill states the continuance of the corporation to this date.

There is no want of parties. The bill seeks to recover only the rent charged upon the land owned by the defendant. The part held by him is precisely described.

As to want of certainty. The complainants cannot state the precise sum. They call for an account to ascertain what that sum is. It is the uncertainty that sends them here. They come here on that very ground. 1 *Story's Eq. Jur.*, § 684; *Benson v. Baldwyn*, 1 *Atk.* 598; *Livingston's Ex'res v. Livingston*, 4 *Johns. Ch. R.* 287, 290.

As to remedy at law. The complainants cannot sue in an action at law. No action for use and occupation would lie against the defendant. The fee is in him.

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In an action at law, the complainants would be compelled to show the share that Shivers would be obliged to pay.

The complainants do not ask any precise sum. They ask Shivers to admit what is true, and to permit them to prove other facts to establish, as far as may be, their rights.

If the Swedish church has merged in, or affiliated with the Episcopal church, and if the trust is diverted, this defendant cannot set it up.

THE CHANCELLOR. The complainants, by their bill, set forth that on or about the twenty-fifth of October, A. D. 1765, they were incorporated by letters patent under the seal of the then province of New Jersey, in the name and under the authority of the King of Great Britain, and that they have continued a body corporate, and have acted and been recognized as such, to the present time. That by their charter of incorporation they were, among other things, invested with power to take, hold, and enjoy all lands, tenements, and hereditaments, corporeal and incorporeal, given, granted, or devised for the use of the said church or parsonage of the town of Swedesborough, and to sell or dispose of the same in fee or for life, under certain yearly rents. And that being seized and possessed in fee of certain lands in the town of Swedesborough, which had been granted to the said church and corporation, for the support and maintenance of the minister thereof, on or about the twenty-fifth of March, A. D. 1768, they sold and conveyed in fee to divers persons, certain parcels of the said lands, in consideration of certain yearly rents reserved to the said corporation, in and by the said deeds to be held in fee, subject to the payment by the grantees, their heirs or assigns, of the annual rent in the said deed specified.

That, on or about the twenty-fifth of April, 1791, the said corporation, by deed, sold and conveyed to Samuel Ogden, in fee, a lot of one acre, in consideration of the yearly rent of twenty-five shillings, reserved to be paid to said corporation for ever. That the said lot has been divided and subdivided by conveyances from those holding under said Ogden. That

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on the fifteenth of March, 1848, a part of said lot, described by metes and bounds, was conveyed by Turner Risdon and wife to the defendant, subject to an annuity or ground rent, payable to the rector and church wardens of Swedesborough church (meaning the complainants), and that it was subject to a proportionate part of the ground rent reserved in the conveyance to Ogden.

That on the third of February, 1853, Shivers conveyed part of said lot, in fee, to one Malachi C. Horner, by metes and bounds, subject to an annuity or ground rent, payable on the twenty-fifth day of March, in each year, to the rector, church wardens, and vestrymen of the present Episcopal church at Swedesborough (meaning thereby to describe the aforesaid corporation). That the liability of the said land for the ground rent reserved, was acknowledged in the deeds and paid by the owners of the lots, respectively, into which the same became subdivided, from the time of the original grant till the time of the conveyance to the defendant, and that the rent was paid by him until the year 1858. But that since that time he has refused to pay any part thereof, and declares his intention to test the right of the complainants to recover the same. And that from inability to produce the deed ~~under~~ under which the defendant claims, and for want of certainty as to the proportion of ground rent properly chargeable on the lot held by the defendant, the complainants are unable to proceed at law.

The bill prays that the defendant may disclose and set forth the title to the lot conveyed to him, and under which he holds the same, and may admit the rent; and that the true apportionment of the annual rent chargeable upon the defendant's land may be ascertained and settled, and that an account may be taken of the rent in arrear, and that the defendant may be decreed to pay the same.

To this bill there is a general demurrer, for want of equity.

1. It is urged that the bill cannot be sustained because the complainants have a complete and adequate remedy at law.

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But inasmuch as the defendants have a fee in the land, and a recovery must be had upon the deed, the complainants cannot safely proceed at law, until the sum for which the defendant's land is liable, is ascertained. This object the complainants' bill seeks to accomplish. Where there is uncertainty as to the extent of the responsibility of the party from whom the rent is sought to be recovered, courts of equity will maintain jurisdiction. 1 *Story's Eq. Jur.*, § 684; *Livingston's Ex'r's v. Livingston*, 4 *Johns. Ch. R.* 287.

2. There is no want of proper parties. The bill seeks to recover only the rent charged upon the land owned by the defendant. That is defined by strict metes and bounds. The right of no other land owner can be affected by the decree. The bill does not ask an apportionment of the rent among the different owners, nor seek to settle any question of boundary or conflicting right.

3. A change in the ecclesiastical relation of the church, for whose benefit the property is held by the complainants, does not necessarily involve any perversion of the trust, or diversion of the fund from its legitimate purpose. There is nothing upon the face of the bill to warrant the inference that the fund is not applied in strict accordance with the terms of the trust. If the fact were otherwise, it could constitute no defence in this suit. The bill alleges that the complainants are the same corporation with that by whom the land was originally granted, and in whose favor the rent was reserved. They are the trustees of the fund, and are authorized to enforce its collection. Its due appropriation is a matter which concerns the *cestui que trusts* alone, and cannot be inquired into in this action.

4. The objection that the value of the suit is too trivial to justify the court in taking cognizance of it, though not specially assigned as a ground of demurrer, may be taken advantage of by special motion to dismiss the bill, or the court may, of its own motion at the hearing, order the bill to be dismissed upon this ground. *Mosely's R.* 47, 356; *Brace v. Taylor*, 2 *Atk.* 253; *Cooper's Eq. Pl.* 166.

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By Lord Bacon's ordinances (Rule 15), all suits under the value of ten pounds are regularly to be dismissed. *Beames' Orders in Chan.* 10.

These rules bear the character of original constitutional ordinances for the government of the practice of the court. *Moore v. Lyttle*, 4 Johns. Ch. R. 184.

The rule in question is founded in reason and policy. Its design is to prevent expensive and mischievous litigation, which can result in no real benefit to the complainant, but which may occasion delay and injury to other suitors. Courts of equity sit to administer justice in matters of substantial interest to the parties, not to gratify their passions, or to foster a spirit of vexatious litigation. If the suit had no other object than the mere recovery of the amount which is the subject of controversy, the bill should be dismissed. But the bill in this case is not filed for the mere recovery of the amount now claimed to be due. It seeks also to establish a right of a permanent and valuable nature, and falls therefore within the recognized exceptions to the rule. *Beames' Orders* 10, note 33; *Story's Eq. Pl.*, § 500, 501.

The demurrer is overruled.

LOUISA M. A. CROWELL *vs.* CHARLES H. BOTSFORD.

1. The issuing of a subpoena, except in cases to stay waste, before the filing of the bill, is irregular, and if promptly brought to the notice of the court, the subpoena, on motion for that purpose, will be set aside as illegal issued.

2. Where a party seeks to set aside the proceedings of his adversary an irregularity which is merely technical, he must make his application for that purpose at the first opportunity. If a solicitor, after notice of irregularity, takes any step in the cause, or lies by and suffers his adversary to proceed therein under a belief that his proceedings are regular, the court will not interfere to correct the irregularity, if it is merely technical.

3. The statute (*N.Y. Dig.* 97, § 6,) is merely directory of the mode of proceeding. The time or form in which the thing is directed to be done

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not essential. The proceedings in such cases are valid, though the command of the statute is disregarded or disobeyed.

4. The issue of the subpoena before bill filed, is a purely technical irregularity, and is waived by an appearance.

The bill in this cause was filed to foreclose a chattel mortgage. The subpoena was issued before the filing of the bill, but no notice was taken of the irregularity, and the cause was allowed to proceed to final decree and execution. The defendant now asks to set aside all the proceedings in the cause, on the ground that the subpoena was issued and served before the bill was filed.

J. Whitehead, for the defendant, in support of the motion.

H. J. Mills, for the complainant, *contra*.

THE CHANCELLOR. The defendant asks to set aside the execution, final decree, and all the proceedings in the cause, on the ground that the subpoena was issued and served before the bill was filed.

The statute provides that no subpoena or other process for appearance, shall issue out of the Court of Chancery, except in cases to stay waste, until after the bill shall have been filed with the clerk of the court. *Nix. Dig.* 97, § 6.

The proceeding on the part of the complainant was clearly irregular, and had the irregularity been promptly brought to the notice of the court, the subpoena, on motion for that purpose, would have been set aside as illegally issued. The effect would have been to compel the complainant to pay the costs of the motion and to sue out a new subpoena.

But no such motion was made. The complainant was permitted, without objection, to proceed to final decree and to sue out execution.

Where a party seeks to set aside the proceedings of his adversary for an irregularity which is merely technical, he must make his application for that purpose at the first oppor-

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tunity. If a solicitor, after notice of an irregularity, takes any step in the cause, or lies by and suffers his adversary to proceed therein under a belief that his proceedings are regular, the court will not interfere to correct the irregularity, if it is merely technical. *Hart v. Small*, 4 *Paige* 288; *Parker v. Williams*, *Ibid.* 439.

It is now insisted that the irregularity is not technical; that the statute is not directory merely, but imperative; and that no valid decree can be made, except there be a strict compliance with its requirements.

The provision of the statute is a regulation of the practice of the court, directing the mode in which its proceedings shall be conducted. The time or form in which the thing is directed to be done is not essential. The proceedings in such cases are held valid, though the command of the statute is disregarded or disobeyed. *Sedgwick on Statutes* 368.

That this is the effect and operation of the statute is apparent, not only from the nature and design of the enactment, but from a reference to its origin and the history of the practice under it.

The commencement of a suit in chancery was originally by bill, before the issuing of a subpoena. The bill contained, as it still does, a prayer for subpoena, which issued as soon as the bill was filed. *Gilbert's For. Rom.* 64; 3 *Bl. Com.* 442-3.

Yet in a very early treatise upon the proceedings of the Court of Chancery, it is stated that " notwithstanding the practice before this time hath been that no subpoena should be sued forth of the Court of Chancery, without a bill first exhibited; yet of late, for the ease of all suitors and subjects, it hath been thought good that every man may have a subpoena out of the same court, without a bill first exhibited." *Tothill's Proceed.* 1.

And by Lord Clarendon's orders in chancery, in 1661, it is directed, "that all plaintiffs may have liberty to take forth *subpœnas ad respondendum* before the filing of their

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bills, if they please, notwithstanding any late order or usage to the contrary." *Beames' Orders in Chan.* 168.

This order continued in force until 1705, when it was enacted (by statute of *Ann, ch. 16, § 22,*) that "no subpoena or any other process for appearance, do issue out of any court of equity, till after the bill is filed, except in cases of bills for injunctions to stay waste, or stay suits at law commenced." The statute is equally peremptory in its terms with our own, yet it has always been regarded as directory only, and a departure from its requirements a mere irregularity, which subjected the party to costs.

In *Hinde's Ch. Pr.* 76, it is said that, notwithstanding the statute, "solicitors, through ignorance or inattention, frequently sue out and serve this writ before the bill be filed, taking care to file the bill on the return day, yet that practice is altogether irregular (except in cases in the statute excepted), and the complainant does it at the risk of costs."

The elementary books all treat the issuing of the subpoena before the filing of the bill, since the passage of the statute, as an irregularity, which exposes the complainant to the hazard of costs. 1 *Newland's Pr.* 62; 2 *Maddock's Ch. Pr.* 197; 1 *Smith's Ch. Pr.* 110; 1 *Daniell's Ch. Pr.* 592.

The same rule prevailed under the ancient practice of the court, prior to the adoption of Lord Clarendon's order, authorizing the subpoena to be issued before the filing of the bill.

Cases are very frequent, during the reign of Elizabeth, where costs are adjudged to the defendant, for want of a bill after the service of a subpoena. *Cary's R.* 98, 103, 105, 114, 118, 143, 145, 153, 156.

Although the defendant was entitled to costs, yet by "preferring costs" he was not relieved from appearing when the bill was filed, and so little was gained by the proceeding, that the practice has become obsolete. It is considered most advantageous for the defendant, when he has been improperly served with a subpoena before filing the bill, to wait till the

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attachment has been issued against him, and then to move to set the process aside for irregularity. The effect of such a proceeding is to oblige the plaintiff to sue out and serve a fresh subpoena. 1 *Daniell's Ch. Pr.* 593.

This, in its operation, is in accordance with the practice in this court, although no resort is had with us to the writ of attachment.

The issue of the subpoena before bill filed, is an irregularity so purely technical, that it is waived by an appearance. 1 *Daniell's Ch. Pr.* 593.

There is another objection which is equally decisive against the motion. It appears, by the evidence, that the subpoena was issued before the filing of the bill, in consequence of a written offer by the defendant's solicitor to enter an appearance for the defendant. An acknowledgment of the legal service of the subpoena was endorsed upon the writ. At the time of the endorsement, the defendant's solicitor knew that the bill had not been filed. The complainant's solicitor was justified in regarding the acts of the defendant's solicitor, as an appearance for the defendant, and as a waiver of the irregularity in the issue of the writ. *Nix. Dig.* 98, § 20.

There is no evidence of surprise or merits. The application rests solely on the ground of illegality of the proceedings on the part of the complainant.

The motion must be denied, and the rule to show cause discharged, with costs.

CATHARINE MCGEE *vs.* JOHN SMITH.

1. The title of a purchaser under a sheriff's sale, is co-extensive with ~~the~~ the description contained in the mortgage, the bill to foreclose, and the ~~with~~ *writ of fieri facias* under which the sale was made.

2. It is not necessary that the decree should describe the premises precisely; it is usual to designate them in the decree by reference to the ~~the~~ *bill*.

3. A party to a foreclosure suit is bound by the decree, and cannot con-

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test the title of the purchaser under it, while the decree and the sale and conveyance remain in force.

4. Where a defendant has filed an answer to a bill to foreclose, a purchaser at a sheriff's sale under the decree, is presumed to have purchased upon the faith of that answer, and in reliance upon the truth of its statements. Such defendant is estopped from denying the truth of the answer, to the prejudice of the purchaser's title.

5. An injunction will not be continued for the mere purpose of restraining a naked trespass, or for the purpose of quieting the possession of a complainant who shows no title to the premises in dispute.

6. The filing of exceptions to the answer constitutes no objection to the dissolution of an injunction, if the equity of the bill upon which the injunction rests has been fully answered.

The complainant, by her bill, alleges that her husband, Hugh McGee, in his lifetime, was seized in fee of a parcel of land in Jersey City, which, on a map of the lands of Cornelius Van Vorst, filed in the clerk's office of the county of Hudson, on the 24th of April, 1847, was known and distinguished as lots numbered twelve and thirteen, on block sixty-three, fronting on the northerly side of Railroad avenue, and being fifty feet wide in front and rear, subject to a mortgage given by McGee and wife to Cornelius Van Vorst, to secure the sum of \$1175, a part of the purchase money of said premises. That, being so seized, McGee in his lifetime built two houses on the land, which, together, covered the entire front of fifty feet on the avenue. That the westerly house is twenty-eight feet in width, and covers the whole front of lot number twelve, and three feet of lot number thirteen; and that the easterly house, on lot number thirteen, is only twenty-two feet in width. That the houses are three stories high, and have a party wall between them, from the foundation to the roof. That McGee, during his life, occupied the westerly house as his mansion or homestead, the other house being occupied by tenants. He died on the 12th of December, 1861. By his will he devised the house and lot on Railroad avenue, numbered two hundred and twenty, to the complainant during her natural life, in lieu of dower, and on her death, to his daughter Hannah; and the house and lot num-

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bered two hundred and eighteen, to his son, Hugh McGee ; the house and lot devised to the complainant, being the house and lot above described as the homestead of Hugh McGee, consisting of lot number twelve, and a part of lot number thirteen. After the death of her husband, the complainant continued in the occupation of the whole of the house and premises devised to her by the will of her husband.

A bill having been filed in this court for the foreclosure of the mortgage upon the said premises, given by McGee to Van Vorst, a decree was made, by which it was directed that the house and lot devised to Hugh McGee, being lot number two hundred and eighteen, should be first sold to satisfy the mortgage, and that the remainder, being lot number two hundred and twenty, which was devised to the complainant for life, after the termination of the life estate, should be next sold for that purpose. At the sheriff's sale under the decree, Smith became the purchaser of lot number two hundred and eighteen. No sale was made of the complainant's life interest in lot number two hundred and twenty.

The bill charges that the defendant claims title, by virtue of his purchase, to twenty-five feet front, including three feet upon which the complainant's house stands, and has entered upon the premises for the purpose of changing the partition wall between the houses ; and prays that the complainant may be quieted in her possession, and the defendant restrained from destroying the party wall, or doing other injury to the complainant's premises, or taking possession of any part thereof by force. An injunction issued pursuant to the prayer of the bill. The defendant, having answered, asks a dissolution of the injunction.

McClelland, for the defendant, in support of the motion.

The answer meets every material averment.

The injunction may be dissolved, though the answer do not fully meet the averments of the bill. *Quackenbush v. Van Riper, Saxton* 476, 488.

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Ransom, for the complainant, contra.

The answer is not fully responsive to the averments of the bill.

A court of equity will restrain irreparable mischief until right be decided at law.

THE CHANCELLOR. The controversy depends entirely upon the title which Smith acquired by his purchase at the sheriff's sale, under the decree of foreclosure. That right, whatever it may be, is paramount to any title which the complainant could acquire under the will of her husband. The complainant, by her bill, alleges that the decree of foreclosure directed that lot number two hundred and eighteen, being the lot devised to Hugh McGee, the son of the testator, should be first sold, and that Smith became the purchaser of that lot. This fact is denied by the answer. It appears that the decree in the foreclosure suit makes no mention of the numbers two hundred and eighteen or two hundred and twenty, which are the city numbers used to designate the houses on the avenue, but describes the lots as "numbers twelve and thirteen, on block sixty-three, as they are known and designated on Van Vorst's map." Those lots are described in the mortgage and in the bill to foreclose, as being each twenty-five feet in width. The sale and conveyance by the sheriff to Smith, was made in accordance with the original division and description of the lots on the Van Vorst map, and not in pursuance of any subsequent arrangement of the lots made by McGee, and recognized in his will. In the original division of the lots on the Van Vorst map, and in the mortgage from McGee to Van Vorst, under which the foreclosure and sale was made, lot number thirteen, which was sold to Smith, is described as being twenty-five feet in width. That is the description of the lot in the bill to foreclose, and in the writ of *fieri facias*, by virtue of which the sale was made. Whether the width of the lot is stated in the decree or not, is immaterial. It is usual to designate the premises in the decree by reference to the bill, not by precise

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description. Catharine McGee, the complainant, was a party to the foreclosure suit, and is bound by it. While that decree, and the sale and conveyance under it, remain in force, she cannot contest the title of the purchaser.

Catharine McGee was not only a party to the foreclosure suit, and bound by the decree, but she filed an answer, claiming to have her life estate in the lot devised to her by her husband, recognized and protected. By her answer she avers that the house and lot devised to her as lot number two hundred and twenty, on Railroad avenue, is the same house and lot described in the Van Vorst mortgage as lot number twelve, and that the house and lot devised to Hugh McGee, as lot number two hundred and eighteen, on Railroad avenue, is the same house and lot mentioned and described in the Van Vorst mortgage as lot number thirteen. She now asks relief upon the ground that the answer is erroneous in stating that those lots are identical, and that, in fact, the lot devised to her is larger than lot number twelve, and that the lot conveyed to Smith is less than lot number thirteen. Whether the lots are, in fact, identical, is a disputed fact in this case. But admitting that they are different, and that the allegation in the answer, of their identity, is a mistake, Catharine McGee cannot, in equity, be relieved against the title of Smith, on the ground of that mistake. She is estopped from denying the truth of her answer. If there were no other ground of defence, Smith would be presumed, as against the claim of Catharine McGee, to have purchased upon the faith of her answer, and in reliance upon the truth of its statements. She cannot gainsay her own statements to the prejudice of his title.

The injunction cannot be continued for the mere purpose of restraining a naked trespass, nor for the purpose of quieting the possession of the complainant, where she shows no right to the premises in dispute. 2 *Eden on Inj.* 390.

The filing of exceptions to the answer constitutes no objection to the dissolution of the injunction, if the equity of the bill upon which the injunction rests has been fully an-

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swered. 1 *Barb. Ch. Pr.* 642; *Livingston v. Livingston*, 4 *Paige* 111; *Robert v. Hodges, ante*, p. 299.

The exceptions, so far as they relate to the points of the case upon which the injunction rests, are formal, rather than substantial. It is obvious that the case made by the bill, is not in accordance with the truth and facts as they really exist, and that all the complainant's equity is fully denied by the answer.

The injunction must be dissolved.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1864.

WILLIAM D. GIVEANS *vs.* WILLIAM McMURTRY and others.

1. A party who comes into a court of equity for relief against a judgment or other security, on the ground of usury, will only be relieved upon paying what is really due upon such security.
 2. Where a party, as security for money loaned, has taken an assignment of a pre-existing judgment against the borrower, and, as a further security for the same debt, has also taken a bond and mortgage; a decree of this court declaring the bond and mortgage usurious and void, will not avail the debtor in a bill for relief to have the judgment declared satisfied of record, the assignment being untainted with usury.
 3. The evidence of a co-defendant is not rendered incompetent by the fact that no order was made for his examination. Since the act of 1859, (*N.J. Dig.* 928, § 34,) removing the disqualification of interest in a witness, as a party or otherwise, no order for his examination is necessary.
 4. Nor is it any objection to the competency of a co-defendant to testify, that he has not answered the bill, but has suffered a decree *pro confesso* against him. The complainant may, at his discretion, require him to answer. But if he do not, the defendant, by failing to answer, cannot deprive his co-defendant of his testimony, or disqualify himself as a witness in the cause.
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McCarter, for complainant.

Two points are made by the original bill.

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1. That the judgments are kept on foot after being paid, without the consent of the defendant in execution.

2. That they were taken as security for an usurious debt.

The answer of McMurtry denies that the judgments were satisfied, and alleges that they were taken as security for the debt for which the mortgage was given, but not as collateral to the mortgage.

The supplemental bill sets up that the bond and mortgage were, by a decree of this court, adjudged null and void, and claims the benefit of such proceedings.

Neither original nor supplemental bill rests the complainant's claim to relief on the ground of usury. That fact is stated, but the decree is not prayed on that ground. The evidence shows that in fact, the claim of the plaintiff in execution was satisfied in full; that the mortgage was given before the assignment was made; and that the judgments ought to have been satisfied of record. No assignment was agreed for, or intended.

If the judgments were assigned in pursuance of the understanding of the parties, it was a mere collateral security to the mortgage. That security has been pronounced null and void.

J. Whithead, for defendant.

The complainant's whole claim rests upon a charge of usury in the mortgage debt, and on the ground that the assignment was made without the complainant's knowledge or consent.

The consent of the defendant in execution was not necessary to a valid assignment of the judgment.

1. Did McMurtry obtain the assignment in good faith, as security for money advanced?

No fraud is charged. The facts, that the money was obtained from McMurtry, that it was paid directly to the plaintiff in execution, and that the judgment was assigned as a security for the money so advanced, are clearly established by the evidence.

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2. The assignment of the judgments was taken as the primary security for the money so advanced.

There was no search for encumbrances upon the property, prior to the date of the mortgage. If, therefore, the mortgage is usurious, the assignment of the judgment is in no wise tainted with the usury.

A prior existing debt, untainted with usury, is not affected by the existence of usury in any subsequent contract. *Gray v. Fowler*, 1 *H. Black.* 463; *Pearsall v. Kingsland*, 3 *Edw. Ch. R.* 195; *Bush v. Livingston*, 2 *Caines' Cases in Error*, 66; *Donnington v. Meeker*, 3 *Stockt.* 362.

The complainant, who asks equity, must do equity before relief will be granted. *Fanning v. Dunham*, 5 *Johns. Ch. R.* 122; *Morgan v. Schermerhorn*, 1 *Paige* 544; *Reeves v. Cooper*, 1 *Beas.* 223, 498; *Miller v. Ford, Saxton* 361; *Fitzroy v. Gwillim*, 1 *Durnf. & East* 153.

THE CHANCELLOR. In the year 1855, a judgment at law and a decree in equity were recovered against the complainant, Giveans, amounting to over \$3200, upon which executions were issued and placed in the hands of the sheriff of Sussex. On the twenty-fifth of February, 1856, the complainant procured of the defendant, McMurtry, through the agency of David Ryerson, the sum of \$3000, which, together with the balance over that amount, due on the judgments, were paid to the respective plaintiffs, and the sheriff's execution fees were satisfied. On the same day a bond and mortgage for \$3000, payable in three years, were given by Giveans to McMurtry, and by assignments of even date, the judgments were assigned to him. In October, 1858, the real estate of the defendant in execution was advertised for sale by the sheriff, at the instance of McMurtry, who claimed to be the assignee of the judgments, in order to obtain satisfaction of the sum of \$3000 advanced by him. Giveans thereupon filed his bill in this court, alleging that McMurtry claimed to hold by assignment, the judgments as collateral security for the payment of the bond and mortgage; that no such as-

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signments had been made, or if made, they were without the consent and against the will of the complainant; and that the judgments were paid and satisfied in full by the defendant in execution. The bill also charges, that if the judgments and executions were assigned to McMurtry, the property levied on could not be sold until the mortgage became due. It also alleges that the loan was made at a usurious rate of interest, being in reality the money, not of McMurtry but of Ryerson, who had charged and received \$300 for making the loan.

The bill prays that the judgments may be satisfied of record, and that the assignments, if any exist, may be delivered up to be cancelled.

The defendant, McMurtry, by his answer, claims that the loan was made, and the money advanced by him, at the instance of Ryerson, who acted on behalf of Giveans, upon the security as well of the judgments as of the bond and mortgage; that the amount due upon the judgments and executions was paid, not by Giveans, but by McMurtry, directly to the plaintiffs in execution; and that the judgments and executions were never satisfied, nor intended so to be, but were assigned by the plaintiffs in execution to McMurtry, in pursuance of an agreement with Giveans, as security for the loan of \$3000 made to him by McMurtry.

That the judgments and executions were assigned to McMurtry is fully established. The deeds of assignment executed by the plaintiffs, are produced in evidence, and their formal execution proved by the subscribing witnesses. No fraud or circumvention is alleged or shown in the procurement of these assignments. The allegation of the bill is that the judgments were paid and satisfied in full by the complainant, and that the assignments were made without his consent and against his will. The substance of the allegation is, that the loan by McMurtry was made upon the security of the bond and mortgage alone, and that the judgments were in fact satisfied, and ought to have been cancelled.

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The only evidence in support of this allegation is that of the complainant himself, who testifies that he heard nothing of the assignments, and never agreed to them; that the loan, in fact, was made solely upon the security of the bond and mortgage. On the other hand, Mr. Ryerson, by whose agency the loan was procured, testifies that McMurtry was to have as security for his money, an assignment of the judgments, and a mortgage from the Messrs. Giveans. They both agreed to give him the security. The circumstances attending the transaction, strongly corroborate the testimony of Mr. Ryerson. The \$3000 loaned by McMurtry was not paid to Giveans, nor were the judgments paid by him. He paid the sheriff's fees, and reduced the amount due on the judgments to \$3000. That sum was paid by Ryerson for McMurtry, into the hands of the attorney of the plaintiffs in execution, upon the express stipulation that the judgments should be assigned to McMurtry. Mr. Thompson, the attorney, testifies that Mr. Ryerson and the Messrs. Giveans came together to his office, and stated that the judgments were to be assigned to McMurtry. The assignments were then drawn, and in a few days returned executed. The judgments were assigned as security for the money. They were arranged to be assigned, and the assignments were drawn at the same time the mortgage was executed. The assignments bear even date with the bond and mortgage. Giveans was present when Ryerson stated that the judgments were to be assigned, and when the stipulation to procure the assignment was executed. The attorney of the plaintiffs in execution, neither drew nor acknowledged the mortgage. The only pretence for the parties going to his office, must have been to ensure the assignment of the judgments. The money was paid into his hands upon his stipulating to have the assignments executed by his clients. This was before the bond and mortgage were executed. The evidence is plenary that the assignments were made, and the judgments were kept alive as security for the money advanced by McMurtry.

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Another ground of relief suggested in the original bill is, that the loan from McMurtry to Giveans was usurious.

After the commencement of the suit, a bill was filed for the foreclosure of the bond and mortgage, which were given contemporaneously with the assignments of the judgments to secure the loan. Giveans, by his answer, set up usury in the mortgage as a defence to the bill. The mortgage was decreed to be usurious, and the bill was dismissed. The complainant thereupon filed a supplemental bill in this cause, setting up that decree as ground of relief in this cause.

Irrespective of the decree in the foreclosure suit, it is clear that the complainant is not entitled to relief against the judgments on the ground of usury. A complainant who comes to a court of equity for relief against a judgment or other security on the ground of usury, will not be relieved, unless upon the equitable terms of paying what is really due to the defendant. *Taylor v. Bell*, 2 Vern. 171; *Scott v. Nesbit*, 2 Bro. Ch. C. 641; *Henkle v. Royal Exchange Ass. Co.*, 1 Vesey, sen. 320; *Fanning v. Dunham*, 5 Johns. Ch. R. 122; *Miller v. Ford*, Saxton 364; *Ware v. Thompson's Adm'rs*, 2 Beas. 67.

The equity cases, says Chancellor Kent, speak one uniform language, and I do not know of a case in which relief has ever been afforded to a plaintiff seeking relief against usury, by bill, upon any other terms.

In 1856, the complainant's property being about to be sold under executions, McMurtry advanced \$3000 for the relief of the complainant, and took an assignment of the judgments and executions, as a security for the repayment of the loan. The complainant has since held and enjoyed his property without the return of any portion of the principal or interest. The judgments remain unsatisfied. If this court restrain the defendant from proceeding at law on the ground of usury, it will only be upon the complainants paying the amount of principal and interest *bona fide* due to McMurtry. That is all that he claims to recover. He is entitled to have from the complainants the sum advanced,

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with interest. If the case stood upon the original bill and answer, there would be no room to question the application of the principle, and that the complainant could have no relief.

The case is in no wise altered by the fact, that the contract for the loan of the money has, by a decree of this court, been pronounced usurious, and the mortgage given as security, declared void. Nor can the complainant escape the application of the principle, by a general allegation that the court, by its decree, pronounced the contract void, without disclosing by his pleading that the decree was made solely upon the ground of usury. It appears by the decree that the loan was pronounced usurious, and the mortgage security therefore void.

The decree has, in fact, no reference whatever to the charge of usury set up in the present bill. That charge is utterly disproved by the evidence. The decree declaring that the bond and mortgage are usurious, upon one ground, cannot establish the fact of usury against the judgments, on another and different ground. It is not pretended that these judgments are usurious. They are admitted to have been valid and subsisting judgments. The complainant's ground of complaint is, that they were paid and satisfied. That charge has been disproved. They were duly assigned for their full value, by the plaintiffs in the judgments, to McMurtry, the defendant. They are security only for the amount actually advanced by McMurtry, and remaining due on the judgments, with legal interest. No usurious interest has been, or can be, recovered upon them. The assignee of the judgments seeks to enforce them, not by virtue of any usurious contract made with Giveans, the defendant in execution, but by virtue of a contract with the plaintiffs.

So far as this case is concerned, the fact of usury is not established. But admitting the usury to have been fully proved, the complainant, in equity, is bound to pay the principal and interest really and *bona fide* due upon the judgment. Having made no such offer, he is entitled to

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relief at the hands of this court. A party asking equity must do equity.

The evidence of a co-defendant is not rendered incompetent by the fact that no order was made for his examination. When witnesses were disqualified on the ground of interest, a defendant having either no interest in the event of the suit, or not being interested in the whole of the matters embraced in the suit, might have been examined as to those matters in which he had no interest. This was done by order of the court. 2 *Daniell's Ch. Pr.* 1036, 1038, 1042.

But since the act of 1859 has removed the disqualification of interest in the witness, as a party or otherwise, no order for his examination has been deemed necessary. The same practice was adopted under the act of 1855, though the rule of July 1st, 1858, required that if the plaintiff or petitioner desired to avail himself of the benefit of the second section of that act, he should be examined before any other witness should be examined in the cause, and within twenty days after issue joined.

Nor is it any objection to the competency of a co-defendant to testify, that he has not answered the bill, but has suffered a decree *pro confesso* against him. The complainant may, at his discretion, require him to answer. But if he do not, the defendant, by failing to answer, cannot deprive his co-defendant of his testimony, or disqualify himself as a witness in the cause.

The bill must be dismissed.

NICHOLAS C. HUDSON vs. THE TRENTON LOCOMOTIVE AND
MACHINE MANUFACTURING COMPANY.

1. Upon a bill for an account, the only material evidence upon the original hearing, is that which conduces to prove the complainant's right to an account. The ordinary decree is that an account shall be taken. Evidence as to the particular items of the account is irrelevant, and, in strictness, inadmissible at this stage of the cause.

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2. As a general rule, the court will not, at the original hearing, examine or decide whether particular items of the account shall or shall not be allowed.

3. The court must, it would seem, settle the construction and effect of agreements between the parties, by which their mutual dealings were regulated, and by which, consequently, the account must be controlled.

4. The court will give special directions to the master as to the manner of taking the account, and the principles by which he should be governed in taking it.

5. The decree must direct to what matters the account shall extend, and in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case.

6. Where the evidence has been taken on both sides before the hearing, without objection, it may be used by the court, so far as may be necessary, in giving directions.

J. S. Aitkin, for complainant.

The bill is for an account under a written contract.

It involves the construction of the contract, the value of the work done and services rendered, and asks that the defendant may be decreed to pay the amount found due, and for such other relief as the complainant may be entitled to.

The testimony has been taken in full by both parties, and the case is now ready for final decree.

Beasley, for defendants.

The only order that can now be made is for an account, and to that we do not object. 2 *Daniell's Ch. Pr.* 997; *Cursus Cancel.* 341; *Gresley's Eq. Ev.* 168.

THE CHANCELLOR. Upon a bill for an account, the only material evidence upon the original hearing is that which conduces to prove the complainant's right to an account. The ordinary decree is that an account shall be taken. Evidence as to the particular items of the account is irrelevant at this stage of the cause. 2 *Daniell's Ch. Pr.* 997; *Gresley's Eq. Ev.* 168; *Walker v. Woodward*, 1 *Russ.* 110; *Law v. Hunter*, *Ibid.* 100; *Tomlin v. Tomlin*, 1 *Hare* 236;

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Seaton's Decrees 42, 45; *Dubouy de St. Colombe's Heirs v. The United States*, 7 Peters 626.

These cases settle the practice that the court will not, at the original hearing, as a general rule, examine or decide whether particular items of the account shall or shall not be allowed, and that evidence for that purpose, in strictness, is inadmissible.

But the principle is not of universal application, and must depend in some measure upon the nature of the pleadings.

By the ancient practice special directions were usual in decrees for account. *Bacon's Ordinances* 50; *Beames' Orders in Chan.* 23, 80; *Tothill's Proceed.* 48.

Instances are not wanting, where the decree ordering the account to be taken, has directed the allowance of particular items. Thus, in *Smith v. Wilkinson*, the master was directed, in taking the account, to charge the defendant with the sum of £8000, borrowed by him from the testator's estate. 2 *Newland's Ch. Pr.* 335; *Seaton's Decrees* 46.

And in *Consequa v. Fanning*, 3 *Johns. Ch. R.* 590, the decree contains specific directions as to various items with which the defendants should be charged by the master in taking the account.

The more modern cases would seem to exclude these directions as to what items of the account should or should not be allowed; but they do not exclude special directions to the master as to the manner of taking the account, or the principles by which he should be governed in taking it. The court must, it should seem, settle the construction and effect of agreements between the parties, by which their mutual dealings were regulated, and by which, consequently, the account must be controlled.

Thus in *Sharp v. Morrow*, 6 *Monros* 300, it is declared, that in referring partnership accounts to a commissioner, the court should settle the construction of the articles of partnership, and decide what kind of accounts come within the partnership, and lay down the principles by which the commissioner should be governed.

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And in *Remsen v. Remsen*, 2 Johns. Ch. R. 501, Chancellor Kent lays it down as a general rule, that orders of reference should specify the principles on which the accounts are to be taken, or the inquiry proceed, as far as the court shall have decided thereon.

The decree must direct to what matters the account shall extend. And in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case. The principle is constantly recognized and acted upon. 2 *Smith's Ch. Pr.* 112; *Hoffman's Ch. Pr. (Appendix)* 169, No. 202; *Izard v. Bodine*, 1 Stockt. 311.

If either of the points upon which the complainant now asks the determination of the court, involves the legal construction of the contract between the parties, by which the statement of the account will be materially affected, or the proper mode of stating the account, or the subject to which the investigation shall extend, it may be proper that the direction should now be given. It may save unnecessary expense and delay in the subsequent stages of the cause.

There can be no objection on the ground of the incompetency of the testimony. The evidence upon both sides has been taken without objection. It is now before the court and may be used, so far as may be necessary, in giving any direction proper to be given at this stage of the cause.

JOHN FLUKE vs. THE EXECUTORS OF FLUKE and others.

1. A direction by a testator "that all the rest and residue of his estate of what kind soever there might be at the time of his death," should be converted into money by his executors, &c., extends to and includes such real estate as he may have acquired after the making of the will, and such land is subject to the power of sale conferred upon the executors.

2. Until the sale be made, the legal title descends to and vests in the heirs-at-law of the testator, as tenants in common.

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3. The heir-at-law takes the legal title charged with the trusts created by the will. Equity will not interfere with the execution of the trusts by the executors. It regards as actually performed, that which is directed to be done.

4. Lands directed by the testator to be sold and converted into money, and the proceeds distributed either among the heirs or other legatees, is regarded as a gift of money.

5. Where the whole beneficial interest in the land directed to be converted into money, belongs to the person or persons for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the land, if he elect to do so before the conversion has actually been made. But where there are several *cestui que trusts* taking different interests under the will from what they would do as heirs-at law, there is no case for the application of the doctrine of election, and the executor must perform the trust created by the will.

Leport, for complainant.

Thompson, for defendants.

THE CHANCELLOR. The bill is filed for the partition of a tract of land in the county of Morris, of which John Fluke, the father of the complainant, died seized.

The complainant claims title to one fifth of the tract, as one of the heirs-at-law of his father. The father died on the 1st of August, 1862, leaving a last will and testament, duly executed to pass real estate. By his will, bearing date on the 15th day of December, 1856, and by a codicil thereto, the testator, after certain specific bequests, ordered and directed, that "all the rest and residue of his estate, of what kind soever there might be at the time of his death," should be converted into money by his executors, and one fifth part thereof paid to each of his four children then living, and the remaining one fifth to the four children of a deceased son of the testator, to be divided between them in unequal shares, *viz.* one equal half thereof to the grandson, and the other half equally between three grand daughters.

The land in question was conveyed to the testator on the 14th of October, 1858, after the date of the will and of the codicil.

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Under the act of 1851, (*Nix. Dig.*, p. 917, § 3,) real estate acquired by a testator after the making of his will, is subject to the disposition made by the will, either by devise or by power of sale. The testamentary disposition extends to all the estate of whatever kind which the testator might own at the time of his death, and necessarily includes the land in question. The rights of the complainant are, therefore, in no wise affected by the fact that the land was acquired by the testator after the making of his will.

The will contains no actual disposition of the lands, but confers upon the executors a naked power of sale. Until the sale be made, the legal title descends to, and vests in the heirs-at-law of the testator. The complainant is, therefore, seized in fee, as tenant in common with the other heirs of his father, of the one equal fifth part of the land in question. *Herbert v. Executor of Tuthill*, *Saxton* 141; *Bergen v. Bennett*, 1 *Caines' Cases in Error* 16; *Gest v. Flock*, 1 *Green's Ch. R.* 108, 113.

But the heir-at-law takes the legal title charged with the trusts created by the will. The land is directed to be converted into money by the executors, and the proceeds to be distributed in the mode designated by the testator. Equity will not interfere with the execution of the trusts by the executors. It regards as actually performed that which is directed to be done. Lands directed by the testator to be sold and converted into money, and the proceeds distributed either among the heirs or other legatees, is regarded as a gift of money. *Fletcher v. Ashburner*, 1 *Bro. Ch. Cases*, 497; *Craig v. Leslie*, 3 *Wheaton* 563.

It is true that where the whole beneficial interest in the land thus directed to be converted, belongs to the person or persons for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the land, if he elect to do so before the conversion has actually been made. *Gest v. Flock*, 1 *Green's Ch. R.* 115; *Craig v. Leslie*, 3 *Wheaton* 563.

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563; *Osgood v. Franklin*, 2 Johns. Ch. R. 21; *Story's Eq. Jur.*, § 793.

But the whole beneficial interest in the land sought to be sold, is not in the complainant. The other *cestui que trusts* are interested in the due execution of the trusts created by the will. They have not joined in the prayer for partition. The devisees of one share are infants. They take, moreover, as legatees, different interests under the will, from what they would do as heirs-at-law. It is not a case, therefore, for the application of the doctrine of election; nor does the complainant rest his case upon this ground.

As the facts are all admitted upon the face of the bill and answer, no benefit can result from a reference to a master.

The bill must be dismissed.

DAVID M. DEMAREST and NICHOLAS H. JEROLEMAN vs. DAVID M. BERRY and others.

1. If a mortgagee in possession, permits the mortgagor to take the profits of the mortgaged premises, the mortgagee will be charged, in favor of subsequent encumbrancers, with all the profits he might have received. So, if the mortgagee refuses to enter, but suffers the mortgagor to take the profits and to protect his possession by means of the mortgage.

2. The principle upon which the court acts is, that if the mortgagee be in possession, or act *mala fide* in regard to subsequent encumbrancers, he will be charged not only with all profits received, but with all which, without fraud or wilful default, he might have received from the mortgaged premises.

3. Where the mortgagee is not in actual possession by himself or his tenant, and has received no part of the profits, nor used his mortgage to interfere with the claims of subsequent encumbrancers, or to protect the possession of the mortgagor, he is not chargeable with any part of the profits.

4. A suit for foreclosure upon each of two mortgages covering the same premises, both of which were in the hands of the complainant when the first bill was filed, is unnecessary and oppressive, and costs will be allowed but in one suit.

5. But where the second bill was rendered necessary by the fact (discovered after the filing of the first) that the mortgage, upon which the first

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bill was filed, covered a part only of the premises included in the other mortgage, proceedings in the first suit will be stayed, and the second suit alone proceed to decree.

Ogden, for complainants.

Cutler, for defendants.

THE CHANCELLOR. It was admitted upon the argument, that there is an entire failure of evidence to support the allegation of the answer, that one of the complainants' mortgages is without consideration and invalid, as against a subsequent judgment creditor. It is also admitted that the objection to the bill for want of proper parties, is not well founded. The only remaining objection relates to the mode of taking the account.

The first mortgage upon the premises was given to the Mutual Benefit Life Insurance Company; the second, to the complainants. Both mortgages were due, prior to June, 1862. In August, 1862, the personal property of the mortgagor was sold under executions at law, and purchased almost exclusively by or in behalf of Demarest, one of the complainants. On the twenty-sixth of January, 1863, the mortgaged premises were also sold under executions at law, and purchased by A. W. Cutler, one of the judgment creditors. Berry, the mortgagor, continued to occupy the mortgaged premises, and to use and enjoy thereon, the personal property bought by Demarest, from August, 1862, till June, 1863, when the personal property was sold at auction, and the mortgagor removed from the premises. The judgment creditor now insists that the complainants, as mortgagees in possession, are chargeable with the rent of the premises from August, 1862, or from January, 1863, when the judgment creditor acquired title to the land.

If a mortgagee in possession permits the mortgagor to take the profits of the mortgaged premises, the mortgagee will be charged in favor of subsequent encumbrancers, ~~with~~

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all the profits he might have received. *Copping v. Cooke*, 1 Vern. 270; *Bentham v. Haincourt*, *Prec. in Chan.* 30.

So if the mortgagee refuses to enter, but suffers the mortgagor to take the profits, and to protect his possession by means of the mortgage. *Chapman v. Tanner*, 1 Vern. 267; *Dux Bucks v. Gayer*, *Ibid.* 257.

The principle upon which the court acts is, that if the mortgagee be in possession, or act *mala fide* in regard to subsequent encumbrancers, he will be charged not only with all profits received, but with all which, without fraud or wilful default, he might have received from the mortgaged premises. *Loftus v. Swift*, 2 Sch. & Lef. 655; *Harvey v. Tebbutt, Jacob & W. R.* 203; *Berney v. Sewell*, *Ibid.* 630; *Coote on Mortgages* 557; 1 *Powell on Mortgages* (by *Coventry*) 291, note D; 3 *Ibid.* 949, 953.

The mortgagee was not in the actual possession of the premises. He received no rents or profits therefrom. The mortgagor remained in the actual possession and enjoyment of the premises, until June, 1863. The facts relied upon to charge the mortgagee with the profits, are, that he permitted the mortgagor to remain in possession, using the personal property of the mortgagee, and to carry on the business of making cider and distilling spirits, with the assistance of the mortgagee, and to some extent in his name. The evidence does not show that the mortgagor acted as the agent or tenant of the mortgagee, or that he in any way attorned to him, or recognized his right to the possession of the premises. Nor was the mortgage used to protect the possession of the mortgagor, or to obstruct a recovery by the judgment creditor. Mere laches in the enforcement of his demand, is no ground to deprive the mortgagee of his interest.

The conduct of the mortgagee is reconcilable with good faith. It was confined within the limits of his legal right, and may have been prompted by a desire to relieve the necessities of the mortgagor. Putting upon it the most unfavorable construction, its wrong consisted in protecting the personal property of the mortgagor from levy and sale for

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the satisfaction of the claims of judgment creditors. In *Charles v. Dunbar*, 4 *Metc.* 498, it was held that where a formal entry by the mortgagee, was to aid the mortgagor in protecting the produce of the farm from attachment by other creditors, it did not affect the question of the mortgagee's liability for profits. The mortgagee not being in actual possession by himself, or his tenant, having received no part of the profits, and not having used his mortgage to interfere with the claim of subsequent encumbrancers, or to protect the possession of the mortgagor, is not chargeable with any part of the profits. The account will be stated accordingly.

The complainants have filed two bills of foreclosure upon two mortgages, both of which were in their hands when the first bill was filed. If both mortgages cover the same premises, two suits were unnecessary and oppressive, and the complainants will be allowed costs but in one suit. It is understood that the filing of the second bill was rendered necessary, by the fact that the mortgage upon which the first bill was filed, covered a part only of the premises included in the other mortgage; a circumstance which escaped attention at the time of filing the first bill. If this be so, proceedings in the first suit should be stayed, and the second suit alone proceed to decree. The question of costs will be reserved.

There must be an order of reference, to ascertain the amount due upon the complainants' mortgages.

FREDERICK NORCOM vs. EDWARD Y. ROGERS.

1. A lunatic can sue only by his committee or guardian, who is responsible for the conduct of the suit, or by the Attorney General or next friend, where the interests of the guardian clash with those of the lunatic.
2. If a complainant appear upon the face of the bill to be a lunatic, and no next friend or committee is named in the bill, the objection may be raised by demurrer, or by motion to take the bill from the files.

Norcom v. Rogers.

3. A bill exhibited by a person of unsound mind should be taken from the files.

4. The bill in this cause having been filed by a lunatic, and the defendant having demurred, leave was given to withdraw the demurrer, and bill ordered to be taken from the files.

Kingman, for complainant.

Rogers, pro se.

THE CHANCELLOR. The bill in this case was improvidently filed. It purports to be exhibited by a party who has been found to be a lunatic, in his own name, against his guardian. The commission has not been superseded, and it is not suggested that any step has been taken to avoid the inquisition. So far as appears by the bill, it is now standing and in full force.

A lunatic sues only by his committee or guardian, who is responsible for the conduct of the suit, or by the Attorney General or next friend, where the interests of the guardian clash with those of the lunatic. 1 *Daniell's Ch. Pr.* 8, 108; *Story's Eq. Pl.*, § 64, 65, note; *Cooper's Eq. Pl.*, 32; *Mitford on Pl.* (by *Jeremy*) 29.

The right of appearing and prosecuting, or defending, any action in any of the courts of this state, in person, or by solicitor or attorney, is expressly limited by statute to persons of full age and *sound memory*. *Nix. Dig.* 654, § 1.

A reference to the contents of the bill in this case manifests the propriety of the rule, and the duty of strictly enforcing it, as well from regard to the interests of the complainant, as to the rights of the defendant.

The objection, if it appear upon the face of the bill, may be raised by demurrer, or by motion to take the bill from the files. 2 *Barbour's Ch. Pr.* 224; *Wartnaby v. Wartnaby*, *Jacob's R.* 377.

A bill exhibited by a person of unsound mind, must have been filed without authority of law. It should, therefore, be taken from the files. This course saves expense and avoids

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the necessity of enrolling the decree, and of thus spreading scandalous or impertinent matter upon the record.

Leave is given to withdraw the demurrer, and the bill will be ordered to be taken from the files.

CLARISSA HOWARD vs. THE EXECUTORS OF WILLIAM E. HOWARD and others.

1. Where there is a general bequest for life with remainder over, the whole property must be sold and converted into money by the executor, the proceeds invested, and the interest only paid to the legatee for life. The rule prevails, except there is an indication of an intention on the part of the testator, that the legatee for life should receive the property bequeathed.

2. The circumstance that a bequest of general personal estate is in the same sentence with a devise of the real, will not make the legacy specific.

3. The well settled rule in equity is, that where it appears that there is danger that the principal of the legacy will be wasted or lost, the court will protect the interest of the legatee in remainder, by compelling the legatee for life to give security for the safe return of the principal.

4. Under like circumstances, the executor himself will be required to give security for the safety of the fund.

Tuttle, for complainant.

A. S. Pennington, for defendants.

THE CHANCELLOR. William E. Howard, in and by his last will and testament, after sundry devises and bequests, including specific legacies to his wife, gave the residue of his estate, real and personal, to his wife during the remainder of her natural life; and upon her death, he gave the same to his four sisters and other legatees.

The testator died in 1829. The executors possessed themselves of his estate, and in 1861, exhibited an account for settlement, by which it appears that after the payment of

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debts and specific legacies, there remained in their hands a residue of nearly thirteen thousand dollars.

The widow now exhibits her bill for relief against the executors and legatees in remainder, by which she prays—

1. That the executors may be decreed to account, and to pay the residue of the estate into her hands.

2. Alleging that the income is insufficient for her maintenance, that the executors may be decreed to pay to the complainant such sums of money as may be deemed just and reasonable for her support and maintenance, and for the payment of her debts.

The rule is, that where there is a general bequest for life with remainder over, the whole must be sold and converted into money by the executor, the proceeds invested, and the interest only paid to the legatee for life. *Howe v. Earl of Dartmouth*, 7 Vesey 137; *Randall v. Russell*, 3 Mer. 193; *Covenhoven v. Shuler*, 2 Paige 132; *Cairns v. Chaubert*, 9 Paige 163; 2 Kent's Com. 353; 2 Story's Eq. Jur., § 845 a; *Willard's Eq. Jur.* 332; 2 *Williams on Ex'rs* (ed. 1849) 1196; *Reed v. Eddy*, 2 Green's R. 176; *Ackerman's Adm'r's v. Vreeland's Ex'r*, 1 McCarter 23.

The rule prevails, except there is an indication of an intention on the part of the testator, that the legatee for life should receive the property bequeathed. *Collins v. Collins*, 2 Mylne & K. 703; *Pickering v. Pickering*, 2 Beav. 31; S. C. 4 Mylne & C. 289; 1 Story's Eq., § 604, note 1.

There is nothing upon the face of the will to indicate an intention that the specific property should be reserved by the legatee. The circumstance that the bequest of the general personal estate is in the same sentence with that of the real, the devise of which is naturally specific, will not be sufficient to make it a specific legacy. *Howe v. Earl of Dartmouth*, 7 Vesey 137; 2 *Williams on Ex'rs* 1006.

But if, by the terms of the will, the legatee for life were entitled to receive the principal of the legacy, upon the facts disclosed by the bill and answer, and by the evidence in the case, she is not entitled to relief.

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The legatees in remainder, by their answer, allege that there is danger of the loss of the fund in case the principal is paid to the legatee for life. The evidence shows the existence of such danger. Independent of the evidence, the fact is apparent upon the face of the complainant's bill; the complainant herself alleging that the interest of the fund is insufficient for her support, and praying that she may have a reasonable allowance out of the principal of the fund for her support and maintenance, and for the payment of her debts.

The well settled rule in equity is, that where it appears that there is danger that the principal of the legacy will be wasted or lost, a court of equity will protect the interest of the legatee in remainder by compelling the legatee for life to give security for the safe return of the principal. *Foley v. Burnell*, 1 Bro. Ch. C. 279; *Rowe's Ex'rs v. White*, ante, p. 411; *Hudson v. Wadsworth*, 8 Conn. 348; *Langworthy v. Chadwick*, 13 Conn. 42; *Homer v. Shelton*, 2 Metc. 206; 1 Story's Eq. Jur., § 604; 2 Story's Eq. Jur., § 845, 845 a. And under like circumstances the executor himself will be required to give security for the safety of the fund. *Batten v. Earnley*, 2 P. W. 163; *Slanning v. Style*, 3 P. W. 335; *Rous v. Noble*, 2 Vern. 249; 1 Story's Eq. Jur., § 603.

There is no ground for requiring an account from the executors. They have settled their account in the Orphans Court. There is no pretence of mistake or fraud in the settlement. The interest of the residue has been regularly paid over to the complainant.

The bill must be dismissed.

AMOS THORP AND WILLIAM SMALLWOOD *vs.* JOSEPH PETTIT

1. A party, who seeks the specific performance of a contract, must sh
that he has performed, or been ready and willing to perform, all the
essential terms of the contract.

2. The answer of the defendant being directly responsive to the
gations of the bill, and a full denial of its equity, injunction disme

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The bill in this cause was filed to restrain the defendant from the commission of certain acts, alleged to be in violation of an agreement with the complainants, and to compel a specific performance of the agreement. An injunction was issued pursuant to the prayer of the bill. The defendant having answered, now moves to dissolve the injunction.

Carpenter, for defendant, in support of the motion.

A bill for specific performance rests on the complainant's having faithfully performed the contract on his part. 1 *Story's Eq.*, § 736; *Batten on Spec. Perf.* 108.

Having failed to perform their part of the contract, the complainants became mere trespassers, and would be liable in that character, but for the receipt for rent given by the defendant. *Taylor on Land. & Ten.*, § 21-4; *Archbold's Land. & Ten.* 58-9; *Doe v. Pullen*, 2 *Bing. N. C.* 749.

The complainants' have, under their agreement, a mere equitable interest. There is no part performance. They are in possession under the old lease. *Archbold's Land. & Ten.* 57; 3 *Zab.* 112.

The contract will not be enforced. 6 *Vesey* 548; 12 *Vesey* 464.

Browning, for complainant, contra.

THE CHANCELLOR. The bill charges that in the year 1862, one Joseph D. Pancoast, being in possession of a grist mill of the defendant, situated in the city of Salem, under a lease which expired on the 25th of March, 1862, the defendant entered into a parol agreement with the complainants, that if they would purchase the interest of Pancoast, he, the defendant, would lease the premises to the complainants at a specified rent for the term of three years and six months, to commence on the 25th of September, 1861, and to end on the 25th of March, 1865; and that he, the defendant, would not, at the said city of Salem, engage in or carry on the business of grinding grain for toll, commonly called "grist work," or of selling flour or feed, except the offal of such grain as he might grind in conducting a merchant milling business at

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said city. It was further agreed that Pettit should draw the proper writings to carry the agreement into effect, and have them ready for execution on, or before, the 25th of September, 1861, at which time the complainants agreed to give the defendant satisfactory security for the performance of the agreement on their part. That at the time specified the complainants were ready to execute the agreement, and to give security for its due performance upon their part. That the defendant produced two papers, bearing date on the 25th of September, 1861; one a lease for six months from that date, and the other a lease for three years from the 25th of March, 1862—the two terms together making the term of three years and six months, for which the defendant had agreed to lease the premises to the complainants. That the lease for six months was then executed; but both the said leases omitting the stipulation on the part of the defendant, not to carry on at Salem the business of grinding grain for toll, or of selling flour or feed, as above stated, the lease for three years was not executed, but the execution thereof was postponed until the covenant on the part of the defendant should be prepared, and both instruments be executed together. That the complainants thereupon entered into possession of the demised premises, and continue, under and in part execution of their agreement with the defendant, to hold the same as tenant of the defendant, as if the said lease and covenant had been executed, and have paid the rent, and covenant had performed all the covenants on their part, as if the said lease and agreement had been executed. But the defendant subsequently refused to execute the said lease for three years or to execute and deliver the covenant on his part not to engage in the business of grinding grain for toll, or of selling flour and feed.

The bill further charges that the defendant, in violation of his agreement, has commenced, and is carrying on, at the city, the business of grinding grain for toll, and of selling flour and feed, and prays that he be restrained from violation of his agreement with the complainants; th

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may account to the complainants for all the grain so ground, and flour and feed so sold, and pay to the complainants the damages they have sustained by reason thereof; and that the defendant may be decreed specifically to perform his agreement with the complainants touching the said lease. An injunction was issued pursuant to the prayer of the bill. The defendant having answered, now moves to dissolve the injunction.

The defendant, by his answer, states that he executed the lease for six months, and that the complainants entered into possession of the demised premises by virtue thereof, and that he subsequently refused to execute the lease for three years, because the complainants failed to furnish the security for the performance of their contract, which they agreed to do. The answer further alleges, that since the complainants have been in possession they have not paid the taxes upon the premises, nor made repairs thereof, as by their agreement they were bound to do.

It is incumbent on a party who seeks the specific performance of a contract to show that he has performed, or been ready and willing to perform, all the essential terms of the contract on his part. 1 *Fry on Spec. Perf.* 270, § 608; *Batten on Spec. Perf.* 108; 1 *Story's Eq. Jur.*, § 736. Upon this point the answer is directly responsive to the allegations of the bill, and is a full denial of its equity.

The injunction must be dissolved.

ISAAC WEATHERBY vs. PHILIP F. SLACK and others.

1. The general rule is, that where a part of the mortgaged premises has been aliened by the mortgagor and a part retained by him, the part retained, as between the mortgagor and his alienee, is primarily chargeable with the debt.

2. The real question in such cases must always be, who, in equity, is bound to pay the debt? The debt is due from the mortgagor to the encumbrancers, and his portion of the mortgaged premises must primarily

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bear the burden, unless it be shown that it has, by some means, been shifted upon the portion of the alienees. This fact it is incumbent upon the mortgagor to establish

Mr. F. Voorhees, for complainant, cited *Saxton* 413; 2 *Halst. Ch. R.* 31; 2 *Green's Ch. R.* 125; 2 *Beas.* 400; 3 *Amer. Law Reg. (N. S.)* 154; *Addison on Contracts* 2; 3 *Green's Ch. R.* 224.

Mr. Vroom, for defendants, cited *Engle v. Haines*, 1 *Halst. Ch. R.* 186; *Wikoff v. Davis*, 3 *Green's Ch. R.* 224.

THE CHANCELLOR. The bill is filed to foreclose a mortgage, given by Slack and wife to Aaron Wills, bearing date on the twenty-third of August, 1851, to secure the sum of five hundred dollars, and by Wills assigned to the complainant.

On the fourth of December, 1851, a second mortgage on the same premises was given by Slack and wife to Sarah N. Bowne, to secure the sum of two thousand dollars, which was subsequently assigned, and is now held by Edward Bowne and Benajah Woodward, trustees, two of the defendants. These mortgages are admitted to be valid and subsisting encumbrances upon the mortgaged premises.

On the sixteenth of August, 1858, Slack and wife executed a third mortgage on the same premises to Samuel K. Wilson, to secure the sum of twenty-five hundred dollars, which was subsequently assigned by him to the firm of Wilson & Bond, and was by them delivered up to the mortgagor to be cancelled, on receiving the conveyance hereinafter mentioned.

On the fourteenth of December, 1861, Slack and wife conveyed a part of the mortgaged premises to Samuel K. Wilson, with covenant of general warranty.

The only question in the cause is, whether that portion of the mortgaged premises thus conveyed to Wilson, or the part retained by the mortgagor, shall be first sold to satisfy the encumbrances.

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The general rule is admitted to be, that where a part of the mortgaged premises has been aliened by the mortgagor, and a part retained by him, the part retained, as between the mortgagor and his alienee, is primarily chargeable with the debt. *Shannon v. Marselis, Saxton* 413; *Wikoff v. Davis, 3 Green's Ch. R. 224; Winters v. Henderson, 2 Halst. Ch. R. 31; Gaskill v. Sine, 2 Beas. 400; 2 Story's Eq. Jur., § 1233 b; 1 Wash. on Real Prop. 570.*

The real question in such cases must always be, who in equity is bound to pay the debt? The debt is due from the mortgagor to the encumbrancers, and his portion of the mortgaged premises must primarily bear the burden, unless it be shown that it has, by some means, been shifted upon the portion of the alienees. This fact, it is incumbent upon the mortgagor to establish.

The mortgagor, by his answer, alleges that the deed to Samuel K. Wilson for a part of the mortgaged premises, was executed to him at the request of the firm of Bond & Reading, (the firm being composed of Samuel K. Wilson, Joseph W. Bond, and Franklin Reading,) and that it was well understood between himself and the said Samuel K. Wilson, on behalf of himself and the other parties, that the property conveyed by the said deed was to be by them accepted, and the same was by them accepted, subject to the payment of the two mortgages upon the premises, set out in the complainant's bill; and he insists that Wilson, having accepted the said deed for a part of the said mortgaged premises, and having received the same in full payment and satisfaction of the mortgage of said firm, which was thereupon given up to be cancelled, and subject to the payment by Wilson, or by the said firm, of the said two mortgages, the balance of the mortgaged premises now held by the mortgagor, is not liable to pay any part of the mortgages, but that the mortgagor, by virtue of the agreement aforesaid, is entitled to hold the same free and discharged therefrom.

The grantees of the mortgagor, by their answer, deny that they, or either of them, ever agreed to accept a conveyance

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of a part of the said mortgaged premises, subject to the payment of the mortgages thereon, or that such deed was accepted in payment of their debt. They allege that the firm holding a mortgage upon the whole of said premises, and a bill having been filed for the foreclosure thereof, the mortgagor, then being the owner in fee of the whole of said premises, proposed to convey the same to the complainants, if they would discontinue the suit, and permit him to occupy the premises one year, rent free. And it was thereupon agreed between the parties, that the said Wilson and Bond should discontinue their proceedings to foreclose, and permit the mortgagor to occupy the premises for one year, free of rent, provided he would pay the taxes, insure the premises against fire, and, together with his wife, execute a deed for the mortgaged premises to the said firm, or to such person, for their use, as they should designate; and that the mortgaged premises subject to the encumbrances, would be received in satisfaction of their mortgage. They further allege that the deed subsequently made by the mortgagor to Wilson, was delivered to one of the firm of Bond and Wilson, under the agreement then made, and was accepted, and the bond and mortgage surrendered, upon the understanding and belief, and under the representation of the mortgagor, that the deed covered the whole of the mortgaged premises.

The issue made by the pleadings is, whether the grantees of Slack, the mortgagor, agreed to accept, and did accept, a deed for part of the mortgaged premises in payment of their mortgage, and upon the condition of their paying the prior mortgages upon the premises. The claim of the mortgagor to make a debt due from himself an encumbrance upon the land of his grantees, depends upon the establishment of that fact to the satisfaction of the court. It is not so established. On the contrary, I think the decided weight of the evidence is, that Slack agreed to make, and the grantees to accept, a conveyance, not for a part, but for the whole of the mortgaged premises, and that the deed actually delivered was not de-

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livered in good faith, or in accordance with the agreement and understanding of the parties.

The mortgaged premises are an ordinary town-lot, consisting of a dwelling-house and lot in Mount Holly, fronting forty-four feet five inches on High street, and extending in depth one hundred and eighty-eight feet one inch; the dwelling-house occupying the front of the lot, and a stable standing on the rear. The deed to Wilson conveys a lot one hundred and sixty-eight feet one inch in depth, thus excluding twenty feet of the rear of the lot, upon which the stable stands. The description of the premises conveyed by the deed, is identical with that covered by the mortgage, as to course and distance, excepting in the length of a single line, so that the variation, even if the deed had been examined, would not be very likely to arrest attention. Nor is there anything upon the face of the deed, indicating that it was for a part only of the lot as held and occupied by the mortgagor. The evidence shows that the part of the lot not included in the deed, is worth five hundred dollars, and that the division would injure the value of the entire premises to a still larger amount. That mortgagees who had commenced proceedings for foreclosure should arrest the suit, and allow the mortgagor to continue a year in possession, rent free, upon receiving a title for the premises without the expense of litigation, is neither incredible, nor improbable. But that they should at the same time consent to receive title for a portion of the premises, by which their security was seriously impaired, is not probable. The mortgagees severally deny that they ever made such an agreement. They all state that they understood the deed to cover the entire mortgaged premises, and they all deny that a word was ever said in the course of the negotiation, about conveying less than the whole of the mortgaged premises. The partner by whom the negotiation for the conveyance was principally conducted, states that the contract was made expressly for the entire lot. But the testimony of the mortgagor himself is decisive upon this point. He says that he proposed to convey the house; that nothing

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was said between himself and the grantees as to the quantity of land he should convey. He drew the deed himself, and included in the description so much land as he deemed sufficient to pay what he owed them. He does not pretend that the attention of the grantees was ever called to the description as he had drawn it; that he ever intimated that it included only a part of the lot held and occupied with the house; or that they supposed or believed that it was other than a conveyance of the entire lot covered by their mortgage. The evidence incontestably proves that the grantees negotiated for, and expected to receive, a deed for the house and lot as they were held and occupied by the grantor. It is incredible that they should have consented to surrender a bond and mortgage upon a town house and lot, and receive in return a conveyance for the house alone, or so much land only as the grantor saw fit to convey.

The land not conveyed by the grantor is chargeable with the mortgage debts, and must be sold first in order. There must be a reference to ascertain the amount due upon the mortgages.

IN THE MATTER OF ADAM S. CHATTIN.

1. A commission of lunacy may issue where the alleged lunatic is an infant.
 2. The issuing of a commission of lunacy rests in discretion.
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Carman, for petitioner.

THE CHANCELLOR. The only question in this case is, whether a commission of lunacy ought to issue, the alleged lunatic being a minor.

Infancy is no bar to the issuing of a commission. But where a guardian has been appointed for the infant, his con-

In the matter of Chattin.

trol over the person and estate of his ward ought not to be interfered with, on the ground that the ward labors under a double disability, except in cases of clear necessity. Even where the lunatic is of full age and the lunacy manifest, the issuing of the commission is not a matter of course, but rests in discretion. It will be issued only where it is required for the interest of the lunatic, or to protect the rights of others. *Ex parte Tomlinson*, 1 *Ves. & B.* 58; *Rebecca Owings' case*, 1 *Bland's Ch. R.* 290; *Stock on Non Comp.* 95.

In the case of *Halse*, an infant cited in *Ex parte Southcot*, 2 *Ves. sen.* 403, a commission was ordered by Lord Hardwicke, on the application of a party who was entitled to the reversion of an estate after the death of the alleged lunatic, although at the time, the infant was under guardianship.

In *Sherwood v. Sanderson*, 19 *Vesey* 289, Lord Eldon, referring to a case within his recollection, said: "That if a lady at the age of seventeen or eighteen had been married by an adventurer for the sake of her fortune, it would be competent for the Chancellor to direct an inquiry whether she was of sound mind when married, and whether it would be for her benefit that a commission of lunacy should issue." And see 2 *Collinson on Lun.* 217.

The authority of guardians over the persons and estates of infants, and the power which this court exercises over the persons and estates of its wards, generally renders the issuing of a commission of lunacy unnecessary during infancy; but if any circumstance renders it necessary or expedient, a commission will issue. *In re Flint*, cited *Shelford on Lun.* 91; *Macpherson on Infants*, 560; *Stock on Non Comp.* 94.

In this case, the infant, though entitled to property, has no guardian. Being over the age of fourteen, he cannot apply for the appointment of a guardian, as prescribed by the statute. His property requires to be protected. The issuing of the commission, therefore, is necessary and proper.

In the matter of Child.

IN THE MATTER OF JOHN M. B. CHILD.

1. Where the alleged lunatic is in an asylum, the commission should be executed in the county where his mansion and estate are, or where he last resided before being sent to the asylum.
 2. It is not absolutely necessary that the alleged lunatic should be before the jury. A commission may issue where he is a non-resident, or temporarily absent from the state, and where it is impossible for the jury to see him.
 3. If necessary, the court will order the party having the alleged lunatic in charge, to bring him before the jury.
 4. Where the estate of the lunatic is small, the court will, it seems, in order to avoid inconvenience and expense, order the commission to issue to a different county from that in which he resides.
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A. Miles, for petitioner.

THE CHANCELLOR. The alleged lunatic is an inmate of the State Lunatic Asylum, in the county of Mercer. Before he was sent to the asylum, he resided in the county of Morris, where his property is situate. In which county shall the commission be executed? Neither the statute, nor the rules of the court, give any direction on the subject. The regular practice of the court is, to direct the commission to be executed in the county where the lunatic ordinarily resides. This is in accordance with the ancient practice of the court. *Ex parte Baker*, 1 *Cooper's Ch. Cas.* 205; *S. C.*, 19 *Vesey* 340; *Ex parte Hall*, 7 *Vesey* 260; *Ex parte Smith*, 1 *Sixan-ston* 4.

In *ex parte Smith*, Lord Eldon said: "If a man resident in the city of London, were conveyed by force into Essex, he would still for this purpose be resident in the city. A man cannot be said to reside in a place, to which he has been carried, while he has not mind enough to intend a change of residence."

The execution of the commission in the county where his residence was, prior to his removal to the asylum, and where

In the matter of Child.

his property lies, is not only in accordance with the settled usage of the court, but will be found in practice, to be the most convenient and appropriate course. If there be any doubt as to the insanity of the party, the investigation and decision of that question, at a place remote from his family and former friends and associates, would be open to grave observation. The inquisition, moreover, respects not only his present lunacy, but how, and when it originated. It extends also to the alienations made by him of his real estate; the lands which still remain to him, and their value; who are his nearest heirs, and their ages. All these questions will be most conveniently and satisfactorily investigated in the place where the party has resided, and where his property is. In *Southcot's case*, 2 *Ves. sen.* 401, the alleged lunatic being abroad, Lord Hardwicke ordered the commission to issue to the county where the mansion-house and a great part of the estate lay.

The objections to this course, that the jury are entitled to see and examine the party, and that witnesses who can speak most satisfactorily as to his present condition of mind, will be found at the asylum, are not insuperable.

It is not absolutely necessary that the party should be before the jury, and in cases free from doubt, it is perhaps not usual.

A commission may issue where the alleged lunatic is a non-resident, or temporarily absent from the state, and where it is impossible for the jury to see him. *Ex parte Southcot*, 2 *Ves. sen.* 401; *S. C., Ambler* 109; *In the matter of Perkins*, 2 *Johns. Ch. C.* 124; *In the matter of Petit*, 2 *Paige* 174; 2 *Barb. Ch. Pr.* 230. And where the party is in the state, and accessible, he may be seen by some of the commissioners, and of the jurors. The material point is, that the minds of the jurors should be satisfied. *Ex parte Smith*, 1 *Swanson* 7; *Case of Covenhoven, Saxton* 19.

Or, if necessary, an order will be made by the court that the party having the lunatic in charge, should have him before the jury. *Shelf. on Lun.* 91; 2 *Hoffman's Ch. Pr.* 252.

In the matter of Child.

It seems from one or two modern cases, that where the estate of the lunatic is small, the court, in order to avoid inconvenience and expense, will order the commission to issue to a different county from that in which the alleged lunatic resides. *In re Waters*, 2 *Mylne & C.* 38; *In re Mills*, *Ibid.* note a.

The residence of the party must be deemed to be where his mansion and property are, or where his last residence was, before he came to the asylum. In the absence of very special cause for a different course, the commission should issue and be executed accordingly.



C A S E S

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1863.

HENRY W. GREEN, Esq., ORDINARY.

EZRA GOULD, appellant, and JANE TINGLEY, executrix of
· David D. Tingley, respondent.

1. Where the notice requiring creditors to present their claims, has been given in pursuance of an order of the Orphans Court, under section 3d of the "act concerning the estates of persons who die insolvent," (*Nix. Dig.* 386,) the creditor cannot be admitted to a dividend of the estate, unless his claim has been presented *under oath*, within the time limited by the order.
 2. Nor does it obviate the necessity of presenting the claim under oath, that the order and notice requiring claims to be exhibited, were made by the surrogate under section 22nd, of the act of 1855. (*Nix. Dig.* 589.)
 3. The act of 1855, on proceeding under a rule to bar creditors, having required the claim of the creditor to be made under oath, dispensed with the necessity of a second presentation of the same claim under proceedings to declare the estate insolvent.
 4. The requirements of both acts are *imperative*, not directory merely.
 5. The question involving the construction of a recent statute, the decree is made without costs against the appellant.
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Gould v. Tingley.

This case came before the Ordinary on an appeal from the decree of the Orphans Court of the county of Essex. The appellant, a creditor of the estate of David D. Tingley, had presented his claim to the executrix, not *under oath*. The claim was not reported to the court. An application was made to compel the executrix to report the claim. The application was denied, and it was ordered that the claim be not included among the debts of the estate, and that the executrix make distribution of the estate among the creditors who had presented their claims *under oath*. From this decree the creditor has appealed.

Hubbell, for appellant.

Williamson, for respondent.

THE ORDINARY. On the twenty-eighth of August, 1861, an order was made by the surrogate of the county of Essex, under the provision of the twenty-second section of the act of 1855, (*Nix. Dig.* 589, § 70,) directing the executrix of the estate of David D. Tingley, to give notice to the creditors of the estate to bring in their claims, under oath, within nine months from the date of the order. The notice was duly published. The claim of the appellant was not presented to the executrix *under oath*. On the seventh of January, 1862, under the provision of the twenty-fourth section of the same act, the executrix was authorized to proceed as though the estate of the decedent was insolvent, agreeably to the "act concerning the estates of persons who die insolvent." On the fifteenth of September, 1862, the executrix made a report of the claims and demands exhibited against the estate, not including the demand of Ezra Gould, the appellant. An application was subsequently made to the Orphans Court, to compel the executrix to include the claim of Gould, in her report of the claims against the estate, in order that a dividend might be paid thereon. This application was, upon hearing, denied, and it was ordered that the claim be not included among the debts of the estate. The estate was declared insolvent, and

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the executrix directed to make distribution of the estate among the creditors who had presented their claims under oath. From the order refusing to admit his claim to a dividend, and also from the final decree of distribution, the creditor has appealed to this court.

If the notice in this case, requiring the creditors to present their claims, had been given in pursuance of an order of the Orphans Court, agreeably to the third section of the "act concerning the estate of persons who die insolvent," (*Nix. Dig.* 386,) it is well settled that the creditor could not be admitted to a dividend of the estate, unless his claim had been presented to the executrix *under oath*, within the time limited by the order. *Vandyke v. Chandler*, 5 *Halst. R.* 49; *Coppuck v. Wilson*, 3 *Green's R.* 75.

The only question is, whether any change in this regard was effected in the law by the act of 1855, where the notice requiring the claims to be exhibited was given pursuant to an order of the surrogate.

It is quite clear that no change was intended to be made by the act of 1855, in the proceedings in regard to insolvent estates, except so far as is expressly provided by the twenty-fourth section of the act. By that section it is provided that, when an order shall be obtained, and notice given, agreeably to the twenty-second section of the said act, if within ten months thereafter, the executor shall make application for that purpose as prescribed by the act, he may take all proceedings, and make, by order of the court, all sales of real estate that may be authorized by the "act concerning the estate of persons who die insolvent," without proceeding as is required by the third section of that act. It is merely a substitution of the order and notice under the twenty-second section of the act of 1855, for the order and notice under the third section of the act respecting insolvent estates. Under the two statutes, the order is made and the notice given for different purposes. Under the act of 1855, they are designed primarily to operate as a limitation to the right of action against the executor. Under the act respecting insolvent estates, the primary design is to ascertain the shares to which

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the creditors are severally entitled in the distribution of the estate. Both statutes require the claim of the creditor to be presented within a limited time, *under oath*. Under the fifteenth section of the act for the limitation of actions, (*Niz. Dig.* 571, § 21,) the claim of the creditor was not required to be made under oath. Nor was the law, in this respect, altered by the act of 1849, for the relief of legatees and next of kin in the recovery of legacies and distributive shares. The latter act (section 3) simply requires the claims to be presented in writing, specifying the amount claimed, and the particulars of the claim. But the twenty-second section of the act of 1855, which seems to have been designed to some extent as a substitute for the former acts, requires the claims against the estate to be made under oath, as in case of insolvent estates. A rule taken to limit creditors, and publication made under the former statutes were of no avail, if the estate was declared insolvent, for the claim was not exhibited under oath. A new order and publication were necessary. But the act of 1855, on proceeding under rule to bar creditors, having required the claim of the creditor to be made under oath, dispensed with the necessity of a second presentment of the same claim under proceedings to declare the estate insolvent.

It is urged that the requirements of the act of 1855, are directory merely, and not imperative. Both acts are alike imperative in their terms. The consequence to the creditor for not exhibiting his claim under the one act is, that he shall be deprived of his dividend in the distribution of the estate; under the other, that he shall be barred of his action against the executor. No reason is perceived, nor is any suggested, why the requirement in the one case, should be regarded as imperative, and in the other, as directory. The clause in the twenty-second section of the act of 1855, which declares that if the creditor shall neglect to exhibit his claim within the time limited, he shall be barred of his action, must be construed to mean an exhibition of his claim in the mode prescribed by law. To require that the claim should be exhibited *under oath*, and then to permit an exhibition of the

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claim not under oath, to satisfy the requirement, would render the enactment nugatory.

But if it be conceded that the requirement of the twenty-second section of the act of 1855, so far as respects the limitation of the claims of creditors, is directory merely, it cannot aid the claim of the appellant, nor in any wise affect the rights of the creditor under the act respecting insolvent estates. Under that act it is clear, that the claim of the creditor must be presented under oath, in order to entitle it to be included among the claims of creditors in the report of the executor, or to entitle the creditor to a dividend of the estate. Admitting that the creditor was not barred of his action against the executrix, under the provisions of the act of 1855, he is barred of all claim for a dividend under the act respecting insolvent estates. Whether the order is made, and notice given under the act of 1856, or under the act respecting insolvent estates, is immaterial. In either contingency, the presentment of the claim by the creditor *under oath*, is a prerequisite to his receiving a dividend of the insolvent estate. No recognition of the claim by the executrix, or by the court, can supply the place of the statutory requirement.

The decree of the Orphans Court was correct, and must be affirmed. As the question presented involves the construction of a recent statute, in regard to which there was room for doubt, the decree is made without costs against the appellant.

M A Y T E R M , 1 8 6 3 .

BROOKS SAYRE, administrator of Isaac Sayre, deceased, appellant, and ANTHONY S. SAYRE, respondent.

1. Evidence taken under an order of the Prerogative Court to be used upon the hearing of an appeal, is competent.

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2. It is no valid objection to a decree of distribution, that it is made in favor of parties who are not applicants therefor, and whose shares have been satisfied or released.

3. The decree of distribution is final and conclusive between the administrator and the distributees, as to the amount of each share, and the party entitled to receive it. It is an effectual protection to the administrator, against all claims for moneys paid pursuant thereto, though it should prove that the decree was erroneous, and the money paid to a party not entitled.

4. The remedy by a party deprived of his rights by the decree, is not against the administrator, but against the distributees who have wrongfully received the estate. In their favor, as against the rightful claimant, the decree does not operate.

5. It is no part of the office of a decree of distribution, to settle whether the share has been paid, in whole or in part, or whether the legal or equitable interest in the fund may have been assigned. Its office is simply declaratory of the rights of the legal representatives or next of kin in the estate of the intestate.

6. The question, whether an administrator has actually paid a claim under the order of distribution or not, can only be properly tried by suit.

7. But no action can be brought by the claimant, until the decree of distribution is made. The decree, it would seem, must of necessity be made, in order that the right may be properly tried and decided.

8. The decree upon the final settlement and allowance of administrator's accounts, is final and conclusive upon all parties interested. It ascertains and declares the net balance in the administrator's hands, and the sum for which he must account to the distributees.

9. The order for distribution may be made at the instance of the administrator, or of any one of the distributees. If made at the time of the settlement, no further notice is necessary.

10. A separate decree cannot be made at the instance of each of the claimants.

11. One decree only, can protect the administrator.

Bradley, for appellant.

C. Parker, for respondent.

Cases cited by appellant's counsel. *Conset on Courts* 216, § 3; *Hall's Adm. Prac.* 101; *Chambers v. Sunderland, Halst. Dig.* 216, § 3; *Read v. Drake*, 1 *Green's Ch. R.* 78.

Cases cited by respondent's counsel. 4 *Grif. An. Law*

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Reg. 1192; Hancock v. Hubbard, 19 *Pick.* 172; *Proctor v. Newhall*, 17 *Mass.* 93; *Osgood v. Breed's heirs*, *Ibid.* 356; *The Ordinary v. The Executors of Smith*, 3 *Green's R.* 93.

THE ORDINARY. At the term of April, 1852, in the Orphans Court of the county of Essex, a decree was made for the final settlement and allowance of the account of Brooks Sayre, administrator of Isaac Sayre, deceased, by which it appeared that there remained in his hands, of the estate, a net balance of \$3091.22 $\frac{1}{2}$. At the same time an order was made that the administrator distribute and pay over the said sum to the persons entitled by law to receive the same.

On the twenty-seventh of March, 1855, on the petition of Anthony S. Sayre, one of the next of kin of the intestate, an order was made that cause be shown before the court on the twenty-fourth of April, then next, why a decree of distribution should not be made, as prayed for in the petition. On the said twenty-fourth day of April, evidence having been taken, a formal decree of distribution was made, by which the next of kin of the intestate are designated, their respective shares ascertained, and the share due to each directed to be paid accordingly. From this decree the administrator appealed. Pending the appeal, evidence has been taken in this court, under an order of the late Ordinary, tending to show that one of the children of the intestate, to whom the decree directed one of the distributive shares to be paid, died several years previous to the decree; that the distributees, to whom one or more of the other shares were directed to be paid, were satisfied in whole or in part, prior to the decree; and that the distributees of two of the shares had, prior to the decree, executed to the administrator a release of their claims.

Of the competency of evidence taken under an order of this court to be used upon the hearing of an appeal, there can be no doubt. It cannot be denied that the taking of additional evidence upon the merits of the case, to be used upon the hearing before an appellate tribunal, is apparently incongruous.

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ous, and is utterly inconsistent with the established principles both of the courts of common law and of equity. But the well settled rule of the ecclesiastical courts is, that such evidence is admissible, and the uniform practice of this court is in accordance with that rule. *Conset's Eccles. Prac.* 216, part 5, sec. 5, § 3; *Hall's Adm. Prac.* 101; *Chambers v. Sunderland, Halst. Dig.* 216, § 3; *Read v. Drake*, 1 *Green's Ch. R.* 78.

The rule, as stated by Conset, is that "in a cause of appeal from a *definitive sentence*, it is lawful, both for the party appealing, and the party appellate, to allege things not alleged before the judge from whom it is appealed; and to prove things not proved, so as the publication of the witnesses produced in the first instance hinder not. But it is otherwise in a cause of appeal from *grievances*, which ought to be proved by the proceedings, and the act of the judge from whom it is appealed."

It would seem from the reported language of Chancellor Williamson, in *Chambers v. Sunderland*, that he regarded the rule as not of general application; but the brief note of the opinion furnishes no clue as to what he regarded as the nature, or extent of its limitation. It will perhaps be found to extend only to that class of cases in which the Prerogative Court exercises original, as well as appellate jurisdiction. However this may be, the present case is clearly within the operation of the rule.

It is insisted that the decree of the Orphans Court is illegal, because it appears that the decree is made in favor of parties who were not applicants for the decree, and whose shares are shown to have been satisfied or released. It is claimed that the decree should be made only in favor of such of the next of kin as apply for the decree; and that no decree can or ought to be made in favor of a party whose claim is shown to be satisfied or released. Upon the argument, the objection appeared to me to have much weight, inasmuch as there appears upon the record, a final decree against the

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administrator, in favor of a party whose claim is in fact extinguished.

But I am satisfied that the objection is not well founded, and that the apparent difficulty results from mistaking the true office and operation of the decree for distribution. The decree is undoubtedly final and conclusive between the administrator and the distributees, as to the amount of each share, and as to the party entitled to receive it. Thus, in an action against the administrator for the recovery of a distributive share, it would be conclusive evidence of the amount to which the plaintiff is entitled. So the decree would be an effectual protection to the administrator, against all claims for moneys paid pursuant to the decree, although it should prove that the decree was erroneous, and the money paid to a party not entitled. The remedy in such case, by a party who has been deprived of his rights by the decree, is not against the administrator, but against the distributees who have wrongfully received the estate. In their favor, as against the rightful claimant, the decree would not operate. This subject was considered and decided by this court in the recent case of *Exton, Adm'r, v. Zule, 1 McCarter 501*, where the Chief Justice sat and advised with the Ordinary.

But even as between the administrator and the distributee, the decree is final only as to the amount of the respective shares, and the persons entitled by law to receive them. It is no part of the office of the decree, to settle whether the share has been paid in whole or in part; or whether the legal or equitable interest in the fund may have been assigned. The law settles with great precision, to whom the shares of the estate shall be allotted in making the distribution. *Nix. Dig. 278, § 12, 13.*

The office of the decree is simply declaratory of the rights of the legal representatives, or next of kin, in the estate of the intestate. Beyond that, it professes not to decide, and in the very nature of the case, it can decide nothing. The claims may be paid, or released, or transferred to other parties, but these are questions with which the decree has no concern,

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and which the court have neither the power, nor the means of investigating. If the administrator should allege that he had paid the claim, how is that question to be settled? It can only be properly tried by suit. But no action can be brought by the claimant, until the decree of distribution is made. The decree, it would seem, must of necessity be made, in order that the right may be properly tried and decided.

In like manner the decree upon the final settlement and allowance of the administrator's accounts, is final and conclusive upon all parties interested. It ascertains and declares the net balance in the administrator's hands. It fixes the sum for which he must account to the distributees. But whether it has been already paid, or is still in the hands of the administrator, it does not decide. It leaves that to be ascertained and settled when the claim shall come to be enforced. The general decree for distribution, which was formerly in common use, simply directed the balance to be paid to the persons entitled by law to receive the same. The special order for distribution, ascertains further who those persons are. But it does not profess to settle whether the claims have been paid, or released, or assigned, any more than does the general decree for the settlement of the estate. The order for distribution may be made at the instance of the administrator, or of any one of the distributees. If made at the time of the settlement of the estate, it is consequent upon the decree for settlement. No further notice is necessary. The notice to the next of kin is in most cases constructive, not actual notice. The decree for distribution is made in their absence, without any actual knowledge of the proceeding. How is the court, under such circumstances, to decide whether payments claimed to have been made by the administrator, have been made or not? The rights of the party cannot thus be decided. The statute does not authorize it.

Nor can a separate decree be made at the instance of each of the claimants. The statute clearly contemplates but one decree. By one decree only, can the administrator be

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effectually protected. The decrees, if several, may vary in amount. It may appear upon the first application, that there are but two claimants, and the applicant may receive the half of the estate, when it may subsequently prove that there were, in truth, three or more. Making separate decrees must lead to endless difficulty. I am satisfied that the proper practice was adopted by the Orphans Court in this case. Even if the evidence now before this court, as to the payment and release of some of the claims, had been before them, it would have been irrelevant to the question which they were called on to decide. For the same reason, I deem it irrelevant to the question at issue here.

The evidence taken before the Orphans Court, has not been sent up with the papers. It does not appear that it was reduced to writing. The evidence taken on the appeal, shows that Hannah Ward, one of the distributees, died on the seventeenth of May, 1819. When the intestate died, does not appear, nor whether Hannah survived him. She left an only daughter, whose claim against the estate appears to have been satisfied. The share of Katy Thompson, one of the sisters of the intestate, is by the decree directed to be paid to Sarah Morgan and Moses Thompson, two of her children. It appears that she left two other children, *viz.* Aaron O. Thompson, and Elizabeth, who married John Harvey Jaques. Whether they are living or dead; and if dead, when they died; or whether they left issue, does not appear. All the children have released their claim upon the estate. In regard to both these shares, the decree will probably require to be corrected. The evidence, as it stands, does not show clearly who, at the date of the decree, were the legal representatives of those shares. It can in no wise affect the real matter in controversy. The number of shares declared, and the amount apportioned to each of the other distributees, is admitted to be correct.

The decree will be corrected in accordance with the facts, upon the production of the proper evidence, or by consent of counsel, without costs to either party as against the other.

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O C T O B E R T E R M , 1 8 6 3 .

JOHN J. VREELAND and wife *vs.* HENRY SCHOONMAKER,
administrator of Enoch J. Vreeland, deceased.

1. The act of 1852, "for the better securing the property of married women," *Niz. Dig.* 503, confers upon the wife no power of aliening or disposing of her separate property; she can only do so by the consent, and with the concurrence of her husband. She has the right of ownership, without the power of disposition.
2. The right of the husband to the wife's choses in action, as well as to her other property, real and personal, was extinguished by the act of 1852.
3. A bond given to the wife in her own name, and accepted by her *in lieu* of specific real and personal property to which she was entitled by inheritance, remains absolutely hers, as if she were a single female, and is not subject to the disposal of her husband.
4. The payment of such bond at its maturity to the husband, its subsequent investment by him in his own name, without objection by the wife, and his receipt of the interest, is no evidence (since the act of 1852) of the transfer of the property from the wife to the husband, or of the determination of her interest.
5. The reduction of a *chose in action* (the separate property of the wife) into possession, by the husband, without the consent of the wife, does not change the title of the property. The husband is accountable for so much of the estate of the wife, secured to her separate use, as has come into his hands.
6. Irrespective of the rights of the wife under the act of 1852, it is not every reduction by the husband, of the wife's choses in action into possession, that will vest the property absolutely in the husband. The ownership follows the will of the husband. But under that act, the husband has no right to convert the wife's choses in action to his own use. Such conversion is a violation of the rights of the wife.
7. The wife's assent to the reduction by the husband, of her choses in action into possession, for the mere purpose of re-investment, is no evidence of her assent to its conversion to the use of the husband.
8. If the wife's separate property consist of land, and she lives upon it, the husband may enjoy it jointly with her; if of chattels in possession, the husband may use them.
9. Though the wife may hold property in her own name, under the act of 1852, as if she were a *feme sole*, she can make no valid contract in re-

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gard to it, nor can she enforce its collection, without the intervention of her husband.

10. The fact that while a husband and wife are living together, he should be permitted to take the interest or profits of her separate estate for their mutual benefit, or for his own use, should, as between *the husband and wife*, raise no presumption prejudicial to her rights.

11. The second section of the act of 1852 does not relate *only* to the property in existence when the law went into operation; it applies equally to *after acquired* property.

12. The bond having been collected by the husband, and the money invested in his own name, the widow cannot claim the protection of the act of 1851. *Nic. Dig.* 282, § 35. That act extends only to the specific chattel or chose in action.

13. The Orphans Court has no authority to try disputed claims, except in the case of insolvent estates. In such case, either the executor or administrator, or any person interested, may file exceptions against the claim of any creditor, and the court are to hear the proofs, and decree and determine in regard to the validity of the claims. It is a settled principle, that the Orphans Court is not the proper tribunal for the trial of disputed claims. But by a disputed claim here, is meant a claim which is disputed by the executor or administrator, not a claim which the legatee or next of kin may deem unfounded or unjust.

14. If the executor or administrator disputes a claim, or refuses to pay it, the Orphans Court cannot allow it, or compel the executor or administrator to include it in his account. To justify the Orphans Court in allowing a claim against an estate, it must appear that the executor or administrator assented to, or recognized it as a debt due from the estate. But if the executor or administrator admit the claim, and pray allowance for it in his account, it is not a disputed claim within the meaning of the rule, and falls properly within the jurisdiction of the Orphans Court.

15. Claims against the estate, paid by the executor or administrator, constitute properly a part of his account. If a claim paid by an executor or administrator, is illegal and unfounded, the charge in the account is open to exception, and the question thus brought within the jurisdiction of the Orphans Court.

16. The mere fact that a debt or legacy has not been actually paid, constitutes no objection to its allowance upon the settlement of the account, if its existence is clearly established. By the settlement, the executor or administrator becomes liable for the amount thus allowed.

17. If an administrator, by collusion with the claimant, claims allowance for a debt not paid, in order to withdraw the cognizance of the question from the ordinary tribunals of law or equity, it is a good ground of exception before the Orphans Court, and the item may be stricken from the account.

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18. An administrator is accountable for all property of the deceased, which came to his hands to be administered. He cannot be relieved from the accountability on the ground of loss, where the loss was occasioned by any default of his own.

19. Loans made on private or personal security, are at the risk of the trustee, who are personally answerable if the security prove defective. To afford complete indemnity to the trustee against the hazard of responsibility for loss, the investment must be made in government stocks, or upon adequate real security.

20. An executor or administrator cannot sell, and part with the possession of assets which have come to his hands to be administered, without requiring security for the price. If he sell under judicial sanction, he must pursue strictly the order of the court. If he sell upon credit, without judicial sanction and upon his own discretion, he must use due caution in obtaining adequate security. If he do otherwise, he acts at his peril; and if a loss is sustained by the insolvency of the purchaser, he is guilty of a *derastatit*.

This case came before the Ordinary on appeal from a decree of the Orphans Court of the county of Bergen.

Enoch J. Vreeland, the intestate, died May 4th, 1861, leaving him surviving, his wife, Sophia Vreeland, but no children. Eleanor Vreeland, one of the appellants, is his sister, and only next of kin. The respondent, Henry Schoonmaker, ministered on his estate, filed an inventory thereof, amounting to \$10,542.24, and, on the tenth of September, 1862, filed his final account, showing

Debits to the amount of.....	\$11,234.49
Credits to the amount of.....	3,565.54

And a balance of..... \$7,668.95

Among the credits claimed by the administrator in his account, are the following:

"He further prays allowance for amount received by Sophia Vreeland, widow, by bequest from her father during coverture with intestate, and which, at his death, remained in his possession, \$2,000.00

"He further prays allowance for amount due from John Blauvelt, on vendue book (desperate), 11.81

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"Also, for amount due from Peter Maginnis, on vendue book (desperate), \$55.08

To these credits the appellants excepted. Evidence was thereupon taken before the judges of the Orphans Court. On the eighth of December, 1862, the court made a decree overruling the exceptions and confirming the account, whereupon the exceptants appealed.

The case, on the items excepted to, is this:

The two small items of \$11.81 and \$55.08, are amounts due for goods of the intestate, which came to the hands of the administrators, and which the latter sold at vendue. Having failed to collect the proceeds of the sale, he asks to be discharged the amount. By his own evidence, it appears that one of the parties to whom he sold, was not deemed responsible.

The item of \$2000 is claimed to be money of the intestate's widow, Sophia Vreeland, which came to her in 1855, from the estates of her father and mother, and which, having been received by the intestate in his lifetime, swelled the amount of his inventory to that extent. The administrator claims the right to retain that amount for the benefit of the widow.

The facts in relation to this money appear to be as follows: Abraham L. Ackerman, the father of Sophia Vreeland, the intestate's widow, died in 1855, leaving personal property to the amount of \$1500. Agnes Ackerman, his wife, died about the year 1850. She owned the homestead farm. In this property Sophia Vreeland had an interest, as one of the heirs. In December, 1855, Sophia Vreeland's brothers, Lawrence and Abraham, (while her husband was living) settled with her and her sister, Hester, by giving them \$2000 a piece, for their share of the father's and mother's estates, giving to Mrs. Vreeland, for her share, their joint and several bond for \$2000, dated December 24th, 1855, and payable May 1st, 1856. She and her sister gave their brothers a release of all their interest in their father's and mother's estates, by deed

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dated December 24th, 1855. Lawrence Ackerman paid her his \$1000 on the first of May, 1856, which was put out at interest in Enoch J. Vreeland's name. Abraham K. Ackerman paid his \$1000 by giving his bond and mortgage therefor, when the joint bond became due. On this bond he paid \$400 to Enoch J. Vreeland, a day or two before his death. This money was given to the administrator by Mrs. Vreeland. He inventoried it, and loaned it to Richard Berdan, and took his note therefor, payable to Sophia Vreeland, or bearer. This note is now held by the administrator as part of the estate of Enoch J. Vreeland. The balance, §600, was paid by note, dated May 1st, 1861, which was inventoried by the administrator, and afterwards paid to him. He put it all out at interest in his name, and holds the notes as securities.

Hayes, for the appellants.

1. The administrator must make good the amount of the small items for which allowance was made.

He knew that one of the parties was not responsible. He should have required security. Having failed to do so, he has become responsible by his negligence.

2. The \$2000 is not due Mrs. Vreeland. The money was mixed with her husband's, and so became part of his general property.

The act of 1851 (*Nix. Dig.* 282) refers to specific chattels, furniture, &c.

Wortendyke, for the respondents.

We base our claim for \$2000 upon the principle contained in the acts of 1851 and 1852.

These enactments limit the property of the wife to her separate use, as if it had been granted to her *separate use*; as if, before the statute, it had been so granted.

1. The sale or transfer by Mrs. Vreeland to her brothers was not a strict sale, but a fair compromise or adjustment of

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what ought to have been done by the will. Hence witnesses called it a legacy.

If the inheritance was the property of the wife, it comes within the policy of the married womens' and widows' acts. (*Nix. Dig.* 503, 282.)

The bond was given in *her name*, in the presence and with the assent of her husband. Lawrence Ackerman paid \$1000, which was invested in bond and mortgage. Abraham paid \$400 in cash, which was loaned by the administrator, and note taken therefor, payable to Sophia Vreeland, or bearer. The \$600 he paid first by note, and eventually in cash. It was put out at interest by the administrator, in his name, and he now holds the notes therefor. The money was, therefore, in the estate.

Richard Berdan swore, that Enoch J. Vreeland said the money was his wife's. He intended to separate that money. That intention was in course of execution.

This question has been up in courts of equity before now. It is not material whether you call it a debt, or any other claim. 2 *Williams on Ex'rs* 1629; *State v. Reigart*, 1 *Gill 1, note.*

No question was raised about the money not having been paid. No inquiry was made as to how it was paid. By the very filing of the account it is appropriated to the use of Mrs. Vreeland. *Mosher v. Hubbard*, 13 *Johns. R.* 510.

2. As to the items sold and money not collected. 2 *Williams on Ex'rs* 1630-1629; *Meeker v. Vanderveer's Ex'rs*, 3 *Green's R.* 292.

Reasonable care and proper diligence only required. 11 *Wend.* 361; 6 *Halst. R.* 145.

Bradley, in reply.

I. The administrator having never paid this money, cannot be allowed a credit for it. *Dayton on Surr.* 508-9; *Wilcox v. Smith*, 26 *Barb.* 346.

If it were a debt due himself, so as to give him the right of *retainer*, he might have appropriated it; but he has not

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the prerogative of assuming the debts of the intestate as his own, and of pocketing so much money as will be sufficient to pay them. He may not pay them; they may never be demanded. If they are not paid, the benefit belongs to the estate and next of kin, and not to the administrator.

The Orphans Court cannot adjudicate disputed claims, except in cases of insolvent estates. *Miller v. Pettit*, 1 *Harr.* 421; *Nix. Dig.* 281, § 29; 589, § 70, 71. The administrator puts it forward as an experiment on the court, in order to make the court the tribunal for the collection of the debt.

The appellants question the widow's right to recover that money. Let her resort to the proper tribunal to establish her claim.

Or, if the administrator will take the responsibility of paying her, let him do so, and then bring in another account.

It would open the door to great frauds, to allow an executor or administrator to credit himself with the debts of an estate without having paid them.

He might never pay them at all, and leave them as an encumbrance on the legatees and next of kin.

He might never *have* to pay them, and thereby make a clear gain out of the money belonging to the estate.

He might compromise them at less than the amount charged for.

The administrator cannot claim this allowance, as for money received by *mistake*. No money of the widow stood separate from the intestate's property. *Johnson v. Corbert*, 11 *Paige* 265.

II. The widow, Sophia Vreeland, is not entitled to recover this claim of the administrator in any tribunal.

1. Not under the widow's act of 1851. (*Nix. Dig.* 282.)

By that act, the widow is entitled to demand of the administrator "all such goods and chattels, choses in action, or other personal property which at coverture belonged to her, or which, during coverture, came to her by bequest, gift, or inheritance, and which, at her husband's death, remained in his possession."

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This \$2000 came to her undoubtedly, during the coverture, by "inheritance," not bequest, as alleged in the account. But it did not remain "in her husband's possession at his death." In order that *her* property may remain *in his possession*, it must be capable of identification.

If it was money, and was *lent* or *given* to him, or allowed to be *mixed* with *his* money, it became *his*, not *hers*. It became a mere *debt*, but not a *legal debt*, for a man cannot owe his wife a debt; a contract cannot be made between them.

Her property in it ceased as soon as its identity was lost. It was then a mere debt, which, as between husband and wife, is extinguished as soon as created. As soon as *property* ceases, *debt* arises.

2. Nor is she entitled to recover this money under the married womens' act of 1852. (*Nix. Dig.* 503.)

"The real and personal property of a married woman, with its rents, issues, and profits, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were single." *Section 2.* This relates to property in existence when the law was passed.

"It shall be lawful for a married woman to receive by gift, grant, devise, or bequest, and hold to her sole and separate use, as if she were single, real and personal property, and its rents, issues, and profits, and the same shall not be subject to her husband's disposal, nor liable for his debts." *Section 3.*

But if she does not choose to receive it; if she chooses to hand it over to him, and let him mix it with his own, she loses it.

She cannot lend it to *him*. They cannot contract together. No debt can be created between them. She cannot deal with her husband in that way.

3. Besides, this \$2000 was in part in consideration of the husband's release. He was entitled to courtesy in the lands, and his release obtained. *Ross v. Adams*, 4 *Dutcher* 160; *Naylor v. Field*, 5 *Dutcher* 292.

4. The declaration of Richard Berdan, that Enoch J. Vreeland told him that Mrs. Vreeland had \$2000 to put out, and

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that he got \$1000 of it, is not competent evidence. *Boylan v. Meeker*, 4 Dutcher 274.

Mr. Bradley further cited and reviewed the following cases: *Jackson v. Miller*, 1 Dutcher 90; *Ex'r of Henry v. Dilley*, *Ibid.* 302; *Johnson v. Parker*, 3 Dutcher 239; *Vannote v. Downey*, 4 Dutcher 219; *Wheaton v. Cooper*, 1 Beas. 221; *Green v. Pallas*, *Ibid.* 267; *Pentz v. Simonson*, 2 Beas. 232; *Wilson v. Brown*, *Ibid.* 277; *Skillman v. Skillman*, *Ibid.* 403; 3 Rev. Stat. (N. Y.) 183, § 81; *Magee v. Vedder*, 6 Barb. 352; *Wilson v. Baptist Educ. Society*, 10 Barb. 308, 316, 320; *Disosway v. Bank of Washington*, 24 Barb. 60; *Andrews v. Wallace*, 29 Barb. 350; *Dayton on Surr.* (1861) 378, 552, and note.

THE ORDINARY. The administrator of Enoch J. Vreeland, upon the settlement of his accounts in the Orphans Court, among other items for which he claimed credit, prayed allowance for \$2000, "amount received by Sophia Vreeland (widow of the intestate), by bequest from her father during coverture with the intestate, and which, at his death, remained in his possession." Exceptions filed to the account by the next of kin of the intestate, were by the decree of the court overruled, and the account was allowed as audited and stated by the surrogate. From this decree the exceptants appealed.

The material question in the cause is, whether the sum of \$2000, which formed the subject of exception, was in fact the property of the widow, or whether it belonged to the estate of her husband. It is admitted that the sum of \$2000 came to Mrs. Vreeland during her coverture, in the year 1855, from the estates of her father and mother, and that it passed into her husband's hands and was inventoried. Her mother died about the year 1850, seized of certain real estate. Her father, Abraham L. Ackerman, died on the 9th of April, 1855, intestate, whereupon his children became each entitled to a share of his estate, as well as of the estate of the mother. In December, 1855, Lawrence and Abra-

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ham Ackerman, two of the sons of Abraham L. Ackerman, agreed with their sisters to give them each \$2000 for their respective shares of their father's and mother's estates. In fulfilment of this agreement, on the 24th of December, 1855, Lawrence and Abraham Ackerman gave to Mrs. Vreeland for her share, their joint and several bond for \$2000, payable on the first of May, 1856. This bond was given to Mrs. Vreeland with the knowledge and assent of her husband, who, thereupon, joined with his wife in a conveyance to her brothers, of all the real estate which she inherited from her mother. It is clear that the property, both real and personal, was the property of the wife, and by operation of the "act for the better securing of the property of married women," became her sole and separate property, and was not subject to the disposal of her husband. It is true that she had no power of aliening or disposing of the property, except by the consent and with the concurrence of her husband. She had the right of ownership, without the power of disposing of it. That power the statute does not confer. Had the property remained in her possession undisposed of, upon the death of her husband, it would have been hers absolutely. It would have formed no part of her husband's estate. Is that title lost by her settlement with her brothers, and receiving their bond in lieu of the estate to which she was specifically entitled? Had she accepted, in lieu of her property, a bond made payable to her husband, so unequivocal an expression of her will, might be regarded as evidence of her intention that the property should become her husband's. But the bond was taken in her own name, and was made payable to her, her executors, administrators, or assigns. Such bond was a valid instrument in the wife's favor at common law.

The husband, it is true, by virtue of his marital rights, acquired a qualified right to the property. He had the right, during the joint lives of himself and wife, to collect the money and appropriate it to his own use. If he survived the wife, it was his. But if the husband died without re-

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ducing the chose in action into possession, it remained the property of the wife. *2 Bl. Com.* 434; *2 Kent's Com.* 135; *Clancy's Husb. & Wife* 5.

But the right of the husband to the wife's choses in action, as well as to her other property, real and personal, was extinguished by the act of 1852. The bond in question, accepted by the wife in lieu of the specific personal and real property which she took by inheritance, remained absolutely hers as if she were a single female, and was not subject to the disposal of her husband. How has *her* title to that property become extinguished? How has the husband acquired title to it? It must be borne in mind that she had both the legal and equitable title to the bond, and to the proceeds of it. She never assigned it to the husband. If she had done so, the assignment would have been inoperative and void at law. She can make no valid contract with any one, much less with her husband, for the transfer of her legal rights. But it is insisted that the facts, that the bond at its maturity was paid to the husband, and was subsequently invested by the husband in his own name, without objection on the part of the wife, and the interest received by him, are plenary evidence of the transfer of the property from the wife to the husband, and of the determination of her interest. That undoubtedly would have been the effect of the collection of the money by the husband, with or without the wife's consent, prior to the enabling act of 1852. But since the passage of that act, she takes and holds the property as a single female. If, as a single female, she had permitted a third person, or if, as a wife, she had permitted a person other than her husband, to receive and collect her moneys, and invest them in his own name, it would have afforded no evidence of the renunciation of her right, or of his ownership of the property. He would be regarded, both at law and in equity, as her agent or trustee. The reduction of the choses in action into possession by the husband, without the consent of the wife, cannot change the title of the property. If by marriage settlement, the estate of the wife be secured

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to her separate use, the husband is accountable for that part of it which comes to his hands. 2 *Kent's Com.* 164. Irrespective of the right of the wife under the act of 1852, it is not every reduction by the husband of the choses in action into possession, that will vest the property absolutely in the husband. The ownership follows the will of the husband. *Hinds' Estate*, 5 *Wharton* 138; *Barron v. Barron*, 24 *Vt.* 375; 2 *Bl. Com.* 434, note 2, by *Shareswood*.

The reduction into possession is, in all such cases, *prima facie* evidence of conversion to his use. He is exercising a right which the law gives him over his wife's choses in action. But under the enabling act of 1852, the husband has no such right over the choses in action of his wife. The absolute interest is in the wife. A conversion of them by the husband to his own use, is a violation of that right. The law, therefore, will not presume, that from the mere reduction of the wife's choses in action into possession, he intended to convert them to his own use, in violation of the rights of the wife. Nor will the wife's assent to the reduction by the husband of her choses in action into possession, for the mere purpose of re-investment, be evidence of her assent to its conversion to the use of the husband. There is in the case no evidence of the intention of the husband to convert the property to his use, or of the assent of the wife to such conversion, other than the mere fact that the money due on the bond having been paid to the wife, was permitted to be invested and re-invested by the husband in his own name, and that the interest was collected by him. These circumstances, in themselves, are not evidence of the conversion of the wife's property to the use of the husband. But the right of the wife does not rest upon this evidence alone. It is shown that an application for a loan of money having been made to the husband shortly before his death, he told the applicant that his wife had \$2000, and he would see what she had to say about it. And he subsequently stated that his wife had given her consent, and thereupon made the loan. Now it must be admitted that this evidence is utterly inadequate

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to prove a transfer of property from the husband to the wife, but it is, nevertheless, competent as tending to evince the absence of intention on the part of the husband to convert the wife's money to his own use. Upon a question between the estate of the husband and the wife, I see no objection to the competency of this testimony. In *Gray's Estate*, 1 Barr. 327, it was held, that a husband's disclaimer of conversion to his own use, at the time of reducing his wife's choses in action into possession, may be established by his subsequent admissions.

Nor is the case materially altered by the fact, that the husband is permitted to take and use the interest of the money while it remains in his hands. That may be done for the joint benefit and support of the husband and wife, while they live together. In fact, the nature of the relation is such, that while it continues, neither can ordinarily have a sole and exclusive enjoyment of their individual property. If the wife's property consists of lands, and she lives upon it, the husband may enjoy it jointly with her. If of chattels in her possession, the husband may use them. The legal relation of husband and wife is so intimate, that it necessarily involves, to some extent, a common use of their individual property. It was not intended that the statute for the better securing the property of the wife, should impair the intimacy and unity of the marriage relation. *Walker v. Reamy*, 12 *Casey* 414; *Naylor v. Field*, 5 *Dutcher* 292.

It is clear that the intervention of no trustee is essential to protect the legal rights of the wife. That is the necessary result of the enabling act of 1852. Her property is protected in her own hands, as well against the claim of the husband, as against strangers. She may receive and hold property in her own name, as if she were a feme sole. But though she may hold, she cannot manage the property without the intervention of an agent. She can make no valid contract in regard to it, nor can she enforce its collection, without the intervention of her husband.

Admitting that the funds of the wife may lawfully be en-

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trusted by her to a third person for investment, why should she be compelled to have recourse to such agency? Or why should the mere fact that they are entrusted to the management and control of her husband, be evidence of the renunciation of her rights, or of the transfer of her property? It would seem that there is no one to whom the care of the wife's property can more naturally, and with more propriety be entrusted, than the husband. And if, while they are living together, he is permitted to take the interest or profits of the estate for their mutual benefit, or for his own use, it should, as between the husband and wife, raise no presumption prejudicial to her rights. I say as between the husband and wife, because it is obvious that, as it regards the interests of third parties, the possession and control of the funds of the wife by the husband in his own name, may create equities and give rise to questions of fraud, which will involve very different considerations. It has been held in the state of New York, that where the husband, by the permission and agreement of the wife, has the exclusive control of her separate estate and its accumulations, by means whereof he is enabled to obtain credit and carry on trade, the property is liable to the claims of the husband's creditors. *Sherman v. Elder*, 1 *Hilton* 476.

It is worthy of notice in this connection, that the enabling statutes of the state of New York confer upon married women, powers in regard to the disposition and management of their estates, not conferred by the laws of this state. The statute of 1848, as amended by that of 1849, enables a married female not only to take and hold her property to her separate use, but also to convey and devise real and personal property, and any interest therein, in the same manner and with like effect as if she were a feme sole. And by the act of 1860, it is enacted that her sole and separate property may be used, collected, and invested by her in her own name.

In the case now under consideration, the question as to the title of the property, is exclusively between the wife and the estate of the husband. The question is embarrassed by no

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intervening equities, or claims of creditors. There is a large surplus in the hands of the administrator, to be distributed agreeably to law. I think the wife is clearly entitled to the sum of \$2000, for which allowance is claimed by the administrator in his account.

It was urged upon the argument, that the second section of the act of 1852 relates only to the property in existence when the act was passed. I have never understood that this was the true construction of the statute. A directly contrary interpretation has been adopted, both in this state and the state of New York, where, with the exception of the last clause, the language of the section is identical.

It is the settled rule of construction in New York, that the second section of the act has no application to property which a wife, married before the act took effect, had at the time of the marriage, or had already acquired during coverture, but that it applies to after acquired property of females, married prior to the act. *Snyder v. Snyder*, 3 Barb. 621; *Holmes v. Holmes*, 4 Barb. 295; *White v. White*, 5 Barb. 474; *Hurd v. Cass*, 9 Barb. 366; *Perkins v. Cottrell*, 15 Barb. 446; *Smith v. Colein*, 17 Barb. 157; *Watson v. Bonney*, 2 Sandf. S. C. R. 405; *Kelly v. McCarthy*, 3 Bradf. 7.

In the case of *Ex'r of Henry v. Dilley*, 1 Dutcher 302, it was held that the act operated as a protection of the rights of property of the wife, existing at the time the act took effect. But it was not decided in that case, nor was it intended to be decided, that the act related only to subsisting rights. The question was, whether the second section of the act was designed at all to affect subsisting rights, and if it was so intended, whether it was not an unauthorized interference with the vested interest of the husband in the property of the wife. Admitting the decision in that case to have been correct, it does not support the position, that the section relates *only* to the property in existence when the law went into operation. Nor does the case of *Vannote v. Downey*, 4 Dutcher 219, nor any other reported case which has been referred to, sustain the doctrine contended for.

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The decree of the court below can derive no support from the provisions of the act of March 12th, 1851, for the relief of widows in certain cases. *Nix. Dig.* 282, § 35. That act, by its terms, extends only to the specific chattel, chose in action, or other personal property, which belonged to the wife at her marriage, or which subsequently came to her, and which remained in the hands of the husband unchanged, at his death. Had the bond given to the wife during her coverture remained in the hands of the husband until his death, the case would have fallen within the operation of that statute. But the bond having been collected by the husband, and the funds, in whole or in part, invested in his own name, it is clear that the widow cannot claim the protection of the act. The act of 1851 effected no change in the rights of the widow to her *chooses in action*, acquired before, or during her coverture, and remaining in the hands of the husband at the time of his death. But, in terms, it transfers the title to the wife's *chattels* in possession of the husband, from the estate of the husband to the wife, saving the rights of the husband's creditors.

It is further urged that this claim is disputed, and therefore, is not the proper subject of adjudication in the Orphans Court; that the exception should have been allowed, and the widow compelled to resort to the ordinary tribunals of law or equity for the recovery of her claim. Our statute has conferred no authority upon the Orphans Court to try disputed claims, except in the case of insolvent estates. In such case, either the executor or administrator, or any person interested, may file exceptions against the claim of any creditor, and the court are to hear the proofs, and decree and determine in regard to the validity of the claims. In all other cases it is a settled principle, that the Orphans Court is not the proper tribunal for the trial of disputed claims. But by a disputed claim here, is meant a claim which is disputed by the executor or administrator, not a claim which the legatee or next of kin may deem unfounded or unjust.

If the executor or administrator disputes the claim, or re-

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fuses to pay it, the Orphans Court cannot allow it, or compel the executor or administrator to include it in his account. To justify the Orphans Court in allowing a claim against an estate, it must appear that the executor or administrator assented to, or recognized it as a debt due from the estate. *Wilson v. Baptist Ed. Soc.*, 10 Barb. 320; *Andrews v. Wallace*, 29 Barb. 350; *Disosway v. Bank of Washington*, 24 Barb. 60.

But if the executor or administrator admit the claim and pray allowance for it in his account, it is not a disputed claim within the meaning of the rule, and falls properly within the jurisdiction of the Orphans Court. The administrator is the legal representative of the estate, and as a general rule, he may, at his discretion, and without the assent of those interested in the estate, pay or compromise any claim against it, even though barred by the statute of limitations. Claims against the estate paid by the executor or administrator, constitute properly a part of his account. If the claims are illegal or unfounded, the charges in the account are open to exception, and thus the question is brought within the jurisdiction of the Orphans Court.

It is further insisted that the claim was not in fact paid, and that it was not a proper charge against the estate by the administrator, until it *was* paid by him. The mere fact that a debt or legacy has not been actually paid, constitutes no objection to its allowance upon the settlement of the account, if its existence is clearly established. Accounts are thus frequently settled, where the legatee or creditor is absent, or not in a situation to receive payment. By the settlement, the executor or administrator becomes liable for the amount thus allowed. No prejudice is occasioned to those interested in the estate. But it is urged that the administrator is, or may be, unwilling to assume the responsibility of paying the claim, but by collusion with the claimant, claims allowance for the debt, in order thus to withdraw the cognizance of the question from the ordinary tribunals of law or equity. There is, to my mind, much force in the objection. And had this

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exception been taken in the court below, before evidence had been heard upon the merits, and had the court been called upon, then, to strike the item from the account, upon the ground now urged for reversal, I think the objection should have been sustained, and if overruled, it would have presented a just ground for reversal upon appeal. But it does not appear that this was made a ground of objection before the Orphans Court, either before the evidence was taken and the hearing had upon the merits, or at any stage of the proceedings. It was, in fact, not made the ground of exception in that court, although it appears upon the face of the account, that no voucher had been taken for the payment of the money, and the form of the claim shows that the money had not been paid. Nor is this objection made the ground of appeal in this court. The specific ground of appeal is that "the item of \$2000, claimed by the administrator as due to Sophia Vreeland, and allowed by said decree, is unjust and illegal, the said Sophia having no just or legal claim to the same." It would seem, from the proceedings in the court below, that the parties voluntarily submitted the question upon the merits to the decision of the Orphans Court, for the purpose of having it decided in the most easy and expeditious mode. Under these circumstances, I do not think that it lies in the mouth of the appellant now to complain, that he is deprived of a hearing before the ordinary tribunals of justice, or before the Court of Appeals in the last resort.

And as the claim has manifestly been made in good faith on the part of the widow, as there is no reason for suspecting the existence of collusion, or a want of good faith on the part of the administrator, as there has been a full and fair hearing and decision upon the merits, I do not feel justified in now turning the parties around, and permitting the appellants to try the experiment of obtaining a different decision in another tribunal.

Exceptions were also taken to two small items of the account, being respectively for \$11.81 and \$55.08, for which

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the administrator prayed allowance "as desperate." The exceptions were disallowed in the court below. And this constitutes another ground of appeal from the decree. The items consisted of two vendue accounts for goods, which were included in the inventory, and which were sold by the administrator upon credit, without security. The purchaser of the smaller bill was known at the time to be irresponsible, but the goods were taken away by him without permission. The other purchaser was regarded as solvent. He gave his note for the amount of his purchase, without security, payable on demand to the administrator, in his individual name.

It is a fundamental principle, that the administrator is accountable for all property of the deceased which came to his hands to be administered. He cannot be relieved from this accountability on the ground of loss, where the loss was occasioned by any default of his own.

It is a well settled rule, both in England and in this state, that if executors, administrators, or other trustees, *loan* money without due security, they are liable in case of loss. *Loans* made on private or personal security, are at the risk of the trustees, who are personally answerable if the security prove defective. To afford complete indemnity to the trustee against the hazard of responsibility for loss, the investment must be made in government stocks, or upon adequate real security. *Gray v. Fox, Saxton 259; 2 Williams on Ex'rs 1539, 1541.*

Sales by executors and administrators, both of real and personal estate, are regularly made for cash, without credit; or by sanction, and under the direction, of some judicial tribunal, prescribing the extent of the credit and the nature of the security.

In some of the states of the Union, personal property is thus sold by direction of the Ordinary, and usually upon personal security.

In this state a practice has long prevailed, of permitting an executor or administrator to sell personal property, either for cash or upon short credits, with approved personal secu

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rity, at his discretion. The custom of selling upon short credits, and upon personal security, without direct judicial authority, has been sanctioned by long and general usage. In practice, it is advantageous to the interests of the estate. Higher prices are obtained, and usually without loss. Cash sales will, in most cases, necessarily be made at lower rates. Where sales are thus made, and security taken with due caution, the executor or administrator is chargeable with no default, and is not liable in case of loss. But in this case, the administrator made the sales in question upon the personal liability of the purchasers, without security of any kind. In the one case, no note was taken; in the other, the individual note of the purchaser. One of the purchasers was known to the administrator to be unworthy of credit; the other, from whom the note was taken, was supposed to be responsible. The conduct of the administrator in both cases was entirely indefensible. I know of no practice to countenance it, and no principle upon which such practice can be justified. On the contrary, I believe the principle to be of universal application, admitting of no exception or qualification, that an executor or administrator cannot sell and part with the possession of assets which have come to his hands to be administered, without requiring security for the price. If he sell under judicial sanction, he must pursue strictly the order of the court. If he sell upon credit, without judicial sanction, and upon his own discretion, he must use due caution in obtaining adequate security. If he do otherwise, he acts at his peril; and if a loss is sustained by the insolvency of the purchaser, he is guilty of a *devastavit*.

I am not aware of any judicial decision upon the point in this state, but I regard the principle as unquestionable, and it is sustained by abundant authority in other states.

In *King v. King's Adm'rs*, 3 Johns. Ch. R. 552, the administrators sold the leasehold estate of the intestate on credit, and took a promissory note of the purchaser, without security. The purchaser paid part of the purchase money, but became insolvent before the residue could be collected.

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The administrators were held responsible for the loss. The Chancellor (Kent) directed that they should be charged with the whole amount of the purchase money, holding them guilty of negligence in parting with the leasehold estate without payment or security. The principle is sustained by numerous authorities. *Orcutt v. Orms*, 3 *Paige* 459; *Stukes v. Collins*, 4 *Desaus*. 207; *Massey v. Cureton, Cheves* 181; *O'Dell v. Young*, 1 *McMullan's Eq.* 155; *Dillebaugh's Estate*, 4 *Watts* 177; *Johnston's Estate*, 9 *Watts & Serg.* 108.

I have dwelt thus long upon this point, which seems too clear to admit of doubt or to require discussion, because the administrator was not charged with this loss by the respected tribunal by whom this cause was originally decided. I have looked with some solicitude, to discover the ground upon which that decision could have been based. It may have been, because they believed that the administrator acted in good faith. I entertain no doubt that he did act in entire good faith, but if the money was lost by his default, the purity of his motives cannot relieve him from his obligation to make good the loss. Or, the court may have decided, upon the principle that the executor was bound only to use ordinary caution in the management of the estate. That principle is admitted. An executor or administrator is bound to use the same caution and circumspection, that a prudent man would use in the conduct of his own concerns. But no prudent man, influenced by the ordinary motives of self interest, and acting with due caution, will let out his money or sell property on credit, without a responsible security for its payment. But the more decisive answer to the suggestion is, that in parting with the assets of the estate to a purchaser without security, the administrator was violating his duty, and was guilty of a default. The law allows no exercise of discretion upon that point. He is bound to require security. In deciding what security he will accept, he acts at his discretion. He is bound to use ordinary caution only, and if the security prove inadequate, the administrator, acting in good faith, is not responsible. The case is not altered by the fact that the goods were removed by one

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of the purchasers, without the knowledge or consent of the administrator. He took no step to obtain security, or compel a restoration of the goods.

The administrator is responsible for the loss sustained by the neglect to require security. Both claims should have been disallowed, and the decree and account must be corrected accordingly. In all other respects the decree is affirmed.

The main question involved in the cause was novel and proper to be heard before this court. Costs will be allowed to neither party as against the other.

JOHN CULVER, appellant, and JAMES BROWN, respondent.

1. The design of the act of 1856, (*Nix. Dig.* 590, § 3,) supplementary to the Orphans Court act, was, that notice should be given to the ward, of an intended settlement by his guardian. No notice to, or appearance by the guardian, can be a waiver of the notice prescribed by the act.

2. Fifteen per cent. commissions having been allowed by the Orphans Court, the law authorizing but seven per cent., decree must be corrected.

This case came before the Ordinary on appeal from a decree of the Orphans Court of the county of Middlesex.

Schenck, for appellant.

Leupp, for respondent.

THE ORDINARY. The appellant having settled his final account as guardian of the respondent, before the Orphans Court of the county of Middlesex, the court, by a subsequent order, opened the account and decree thereon, and permitted the ward to file exceptions to the account. From this latter decree the guardian has appealed.

Culver was appointed guardian of the respondent on the

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20th of March, 1844, the ward then being under seven years of age. When his office was determined, does not appear. His last disbursement for the ward was under date of the 16th of June, 1852. On the 18th of January, 1856, he delivered over to David Yates, the newly appointed guardian, fifty dollars as funds belonging to the ward. At the term of December, 1857, he exhibited his final account as guardian, for settlement and allowance, no previous settlement having been made. On the 12th of January, 1858, a decree was made for the settlement and allowance of the account. On the 29th of the same month of January, on the application of the ward, a rule was granted to show cause why the decree should not be set aside, and the account opened. Evidence having been taken, the rule was made absolute on the 12th of March following. The decree opening the account, appears, by its recital, to have been made for errors, irregularities, and mistakes made manifest.

It is insisted by the appellant that the decree was erroneous, because there is no evidence, either of fraud or mistake, and that, by the terms of the statute, the decree upon the final settlement and allowance of the account, is conclusive upon all parties. *Nix. Dig.* 581, § 27.

I incline to think that the decree for the settlement and allowance of the guardian's account was a nullity. It does not appear by the evidence that the settlement of the account was advertised, or that any notice thereof was given to the ward, nor can it be gathered from the proceedings in the Orphans Court, that any such advertisement or notice was given. On the contrary the decree itself, as if by way of substitute for the legal notice, states that Brown, the minor, appeared by his guardian, David Yates. Yates, on his examination, testifies that one, two, or three days before the term, Culver spoke to him about the settlement of his account. He adds: "I told him I would be there, and that it would not be necessary for him to serve a notice on me. That he could settle with the court, and I would examine it afterwards. I don't

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know anything about the account, whether it is correct or otherwise. I never saw it."

The act of 1855, (*Nix. Dig.*, 1st. ed., 562, § 8,) requires that in addition to the notice then required by law, the guardian should give to all the wards interested in the account to be settled, thirty days notice of his intention to settle his account.

The act of 1856, (*Nix. Dig.* 590, § 3,) repeals the eighth section of the act of 1855, and declares that no account of any guardian shall be audited or allowed, unless the guardian shall give at least two months notice of such settlement by advertisement, as prescribed in the act. It was expressly required by the act of 1855, that notice should be given to the ward, and such was the manifest design of the act of 1856. No notice to, or appearance by the guardian, can be a waiver of the notice prescribed by the act of 1856. The court appear to have proceeded on the erroneous assumption, that the appearance by the newly appointed guardian was a waiver of, or a substitute for, the notice required by the statute.

But aside from this objection, the court were justified in opening the account and admitting exceptions to be filed, both on the ground of fraud and mistake. The guardian was appointed in 1844. In 1850, he had sold the real estate of the ward. In 1852, he had made the last disbursement for his ward. In 1853, the ward was in his employ, earning wages. In 1856, the guardian, having been discharged from office, turned over fifty dollars of the ward's funds to his newly appointed guardian, as a balance that was coming to him. In 1858, a few months before the ward came of age, the guardian, without notice to the ward, or an opportunity on his part to be heard, settled his account, showing a balance in his own favor. Notice was indeed given, two or three days before the court, to the newly appointed guardian, of an intention to settle the account, but he had no knowledge of its character or contents, and in waiving notice to himself, and consenting to the settlement, it was upon the manifest

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understanding, on his part, that any error could be subsequently corrected. An application was made within a few days, to open the account and correct errors, but the accountant insisted that the settlement was conclusive against his ward. Under these circumstances, the court were justified in holding the settlement fraudulent as against the minor.

It may be added, that there is at least one manifest mistake in the account as settled. As the law stood at the settlement of this account in 1858, and as it now stands, the commissions allowed to a guardian, cannot exceed seven per cent. on sums not exceeding one thousand dollars, received and paid out. The commissions allowed the guardian in this case, amounted to nearly fifteen per cent. on the sum received and paid out. This, it is true, would not be a ground for opening the entire account, but it shows the necessity of its correction, and the propriety of requiring that the ward should have an opportunity of being present at the settlement, and protecting his rights.

The decree is affirmed with costs.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY.

JUNE TERM, 1863.

JOSIAH F. MUIR, appellant, and THE NEWARK SAVINGS INSTITUTION and others, respondents.

1. If an agent, in making a loan of money, accept from the borrower a bonus beyond the legal rate of interest, such act of the agent will not render the contract usurious, if the bonus was taken without the knowledge of the principal, and was not received by him.
 2. The reservation of interest for money actually on hand and subject to the call of the borrower, during the time he is engaged in completing his securities, is not usurious.
 3. The essence of the offence of usury is a corrupt agreement to contravene the law. Any contrivance to evade the statute, and to enable the lender to receive more than legal interest for his money, renders the contract a corrupt one. And the law will infer the corrupt agreement, when it appears by the face of the papers or otherwise, that illegal interest was intentionally reserved, although the illegality arose from a mistaken construction of the law.
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Muir v. Newark Savings Institution.

This was an appeal from a decree of the Chancellor. The appeal was argued by

Zabriskie, for appellant.

Hubbell, A. Mills, and *C. Parker*, for respondents.

The opinion of the court was delivered by

ELMER, J. The bill filed by the Newark Savings Institution, is the common bill for the foreclosure and sale of certain mortgaged premises, to pay the balance claimed to be due from the appellant on his bond and mortgage, bearing date July 1st, 1850. To this bill the executor of Abraham Brittin, deceased, was made defendant, so that the amount due on a bond and mortgage given by the appellant to the said Brittin for \$3000, dated February 10th, 1859, might be included in the decree. The executor answered, and prayed to have a decree for the sale of the property, and the payment of the principal and interest due on the mortgage. The appellant, in his answer, set up the defence of usury as against both debts.

As to the bond and mortgage to the Savings Institution, the usury is alleged to have arisen in two ways. First, he says that it was agreed between him and William B. Mott, acting for and on behalf of the complainants, that they would loan to said defendant the sum of five thousand dollars, upon condition that defendant would pay therefore the sum of one hundred dollars, which he avows he did pay to said Mott, at or about the time of the delivery of said bond and mortgage. And secondly, he says, that the said bond and mortgage bear interest from, and are dated July 1st, but that the money was not actually paid over by complainants, or received by defendant, until the ninth of said month.

We are not satisfied that the first ground of usury thus set up, is proved to be true. The defendant himself swears to the facts; but although the statute has made him a competent witness, his credibility is open to question, and we do

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not feel justified in deciding that a debt, secured by a bond and mortgage shall be discharged by the uncorroborated oath of the party who has made and is bound by them. In this case, it appears that he has paid the interest for many years, and a part of the principal, and made no complaint of usury during the lifetime of Mott, who alone could contradict him. But if he did pay a *bonus* of one hundred dollars to Mott to obtain this loan, as he alleges, there is not only no evidence that he had any authority from the institution to receive it, or that the other members of the funding committee, by whose concurrence the loan was made, had any knowledge of the transaction; but it is proved that they were ignorant of it, and that no part of the money went into the funds of the complainants. This ground of usury, therefore, entirely fails.

It appears, as to the second ground, that the money was not in fact paid over to the defendant until the tenth of July, and that Mott, who was treasurer, and as such one of the funding committee, made an entry in the books of the institution, as follows: "1850, July 3d, bond and mortgage account, Dr. to cash for Josiah F. Muir's bond and mortgage on property at Chatham, N. J., \$5000."

It is insisted for the appellant, that it thus appears the bond and mortgage were made to bear interest several days before the loan was made, and that this was such an intentional violation of the law, as to amount, whatever may have been the motive of the parties, to a corrupt agreement, and was therefore usurious. The essence of the offence of usury is a corrupt agreement to contravene the law. Any contrivance to evade the statute, and to enable the lender to receive more than legal interest for his money, undoubtedly renders the contract a corrupt one. And there is no doubt that the law will infer this corrupt agreement, when it appears by the face of the papers or otherwise, that illegal interest was intentionally reserved, although the illegality arose from a mistaken construction of the law. So it was held in the cases to which we were referred. *Marsh v. Martindale*, 3 Bosan.

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& *Pull.* 154; *Bank of Utica v. Wager*, 2 *Cow.* 712, and other New York cases of a like nature; *Bank of Maine v. Butts*, 9 *Mass.* 49; *Williams v. Williams*, 3 *Green's R.* 255.

But in the case before us there was no contrivance to evade the statute, nor was illegal interest intentionally reserved. The appellant's own statement is, that he entered into an agreement with the funding committee to take the money, and that they had it on hand subject to his disposal, before the first of July, and that the delay occurred in having the security prepared and executed. The entry in the books of the institution, of the loan on the third of July, cannot be regarded as conclusive proof that the agreement was not entered into at an earlier date. As the case is presented, we think we are fully justified in considering that it was; it being apparent that there was no design on the part of either lender or borrower, to take or to allow illegal interest. No case has been produced, which has held it to be illegal to reserve or take interest for money actually on hand and subject to the call of the borrower, during the time he is engaged in completing his securities. In the case of *Keyes v. Moultrie & Palmer*, 3 *Bosw.* 1, the Superior Court of New York decided, we think correctly, that a contract of this character is not usurious. We are, therefore, of opinion that the decree of the Chancellor, ordering an account to be taken of the amount due on the complainant's bond and mortgage, is correct, and must be affirmed.

As to the Brittin mortgage, the allegation is that it was given to secure a loan of three thousand dollars, and that said loan was made upon express condition that the appellant should take, as a part thereof, a horse at the price of five hundred dollars, and that said horse was not worth more than two hundred and sixty dollars. If these allegations were proved, the defence would be complete. But we are not satisfied that they are. This defence, like that in the case of the Savings Institution, is set up after the death of the party with whom the contract was made. The evidence relied on consists of the appellant's own statements, not made on oath, and some

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of which were clearly incompetent. There is no satisfactory evidence of the material allegation that the taking of the horse at the price named was a condition of the appellant's obtaining a loan. It appears that he signed a receipt, that he had received Brittin's check for \$2000, three notes of other parties amounting to \$540.02, and a four year old stud colt, \$500, for which he had given his bond and mortgage for \$3000, and his note for \$40.02; but this receipt does not show that the taking of the notes and the horse was not at his own request. It was insisted that the situation of the appellant was such that we ought to infer that he could not have desired to purchase such a horse. Such an inference, we think, would be very unsafe, and would amount to the substitution of conjecture for proof. Nor is the evidence that the horse was not worth the money agreed to be paid for him, at all conclusive. Several witnesses, it is true, rated him at from \$125 to \$200; but the little reliance that can be placed on such estimates is shown by the fact, that although the horse was stolen shortly after the purchase, and considerably injured, he was actually sold for \$260. He was certainly a horse of rather remarkable beauty, and several good judges testify that he was worth \$500. The appellant himself stated, at the time he was stolen, that he was a valuable horse, worth \$500 or \$600. We think the Chancellor's order that an account be taken of the amounts due on this bond and mortgage was correct, and that the whole decree must be affirmed.

The decree of the Chancellor was affirmed by the following vote :

For affirmance—Judges BROWN, COMBS, CORNELISON, ELMER, FORT, HAINES, KENNEDY, OGDEN, VREDENBURGH, WALES, WOOD—11.

For reversal—NONE.

Norris v. Ex'rs of Thomson.

NOVEMBER TERM, 1863.

CAROLINE NORRIS, ADELINE THOMSON, and others, appellants, and THE EXECUTORS OF JOHN R. THOMSON and others, respondents.*

1. To constitute a legacy *specific*, it is necessary that such intention be either expressed by the testator in reference to the thing bequeathed, or otherwise clearly appear from the will.

2. This is not a technical arbitrary rule to be answered only by the use of particular words and expressions, but is an embodiment of the general principles by which the character of legacies should be tested and determined, each will resting for correct construction upon the language employed, and upon established surrounding significant circumstances, if such exist.

3. The language used by the testator in creating and directing the trusts in the will, has a clear reference to the stocks and particular bonds which the testator possessed when he executed the will, and shows that the testator intended that the legacies should be discharged by his trustees handing over to the respective legatees, stock and bonds which they would find in his strong box after his death. *Per OGDEN, J.*

4. If the language of the will does not come up to the rule laid down in the books, the circumstances by which the testator was surrounded when the will was drawn, and the whole scope and texture of the instrument taken in connection with the particular clauses of bequest, clearly indicate an intention to create a specific legacy.

* NOTE. This case has been reported, and the opinion of one of the judges is published in 2 *McCarter* 493.

It does not appear that the opinion heretofore published was read in open court, or that the legal principles it announces, were concurred in by any other member of the court. In so far as it may be understood as sanctioning rules of construction, different from those announced in the opinion of the court, it can, it is apprehended, only be regarded as the dissenting opinion of the judge by whom it was delivered. The opinion of the court was read by OGDEN, J. The construction adopted by the learned judge, being derived from the whole scope and texture of the will, it is thought advisable, in order to a clear understanding of the principles upon which his opinion rests, to publish the will at length.—THE REPORTER.

Norris v. Ex'rs of Thomson.

This cause was heard upon appeal from the opinion of the Chancellor (*reported ante*, p. 218) upon the construction of the will of John R. Thomson, deceased.

The will is as follows :

"I direct my debts and funeral and testamentary expenses to be paid, and I appoint John M. Read, Charles Macalester, and Alexander H. Thomson, my executors.

I do hereby give and bequeath, all and singular, the books, pictures, plate, china, wines and liquors, and all other household goods and furniture of every kind, which shall be in and about my house at Princeton, and also in and about my house at Washington, and all my horses and carriages, to my wife, Josephine A. Thomson.

All the rest and residue of my real and personal estate, of whatsoever nature or kind, or wheresoever situate, I give, devise, and bequeath to John M. Read, Charles Macalester, and Alexander H. Thomson, their heirs, executors, and administrators, in trust for the following uses and purposes :

First. To give to my sister, Mrs. Caroline Norris, two hundred and fifty shares of the capital stock of the New York and Baltimore Transportation Line; to my sister, Adeline Thomson, two hundred and fifty shares of the capital stock of the said line; to my sister, Amelia Read, wife of the Hon. John M. Read, two hundred and fifty shares of the capital stock of the said line; to my nephew, Alexander Hamilton Thomson, one hundred and twenty-five shares of the capital stock of the said line; and to my niece, Elizabeth Norris, one hundred and twenty-five shares of the capital stock of the said line.

Secondly. I give to my friends, John M. Read, William H. Gatzmer, Richard Shippen, Dr. Phineas J. Horwitz, and Joseph P. Norris, the husband of my sister, Caroline Norris, five bonds of one thousand dollars each, of the Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transportation Company, redeemable in 1889, one bond to each of the above named legatees.

I also direct to be paid an annuity of five hundred dollars,

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during his natural life, to my brother, Edward R. Thomson, of the United States navy.

And I further direct that, from the income of the residue of my estate, there shall be paid an annual sum of ten thousand dollars, payable semi-annually, to my wife, Josephine A. Thomson, and I authorize and empower my said wife, by her last will and testament, duly executed, to direct, limit or appoint, give or devise, the portion of the estate so appropriated for an income of ten thousand dollars a year for her support, to give or devise the same to and amongst all and every the children of my sisters, Caroline Norris and Amelia Read, and their children, in such proportions, and for such estate or estates, as she may think proper; or if my wife so chooses, she may, by her last will and testament aforesaid, direct, limit, or appoint, give or devise the same to and among my sisters, Caroline, Adeline, and Amelia, and their children and grand-children, and my brother Edward, in such proportions, and for such estate or estates, as she may think proper; and my said trustees, their heirs, executors, and administrators, are hereby required to pay, assign, convey, and transfer the same to the said appointees, according to the directions, limitations, appointments, gifts, and devises in the said last will of my said wife.

And I further direct that, if the income from my estate, after the payment of the bequests herein before made, shall exceed the sum of ten thousand dollars a year, the surplus be invested in good securities, and that my said wife, Josephine, shall be authorized and empowered by her last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions, as she may think proper.

And in default of such directions, limitations, and appointments, and so far as the same shall not extend, then to pay, assign, convey, and transfer the residue to my said three sisters, Caroline, Adeline, and Amelia, and my brother Edward, their heirs, executors, and administrators, as tenants in common, to whom I give and devise the same.

Fourthly. I authorize my said trustees and executors to

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retain and hold whatever investments I may have at my decease, unless requested, in writing, by my wife to change the same.

I authorize my said executors and trustees, in either capacity, to sell and convey all, or any part of my estate, real and personal."

The appeal was argued by

Zabriskie and Beasley, for appellants.

Bradley, for respondents.

The opinion of the court was delivered by

OGDEN, J. The single question presented for adjudication by this case, and upon which the respondents, who were defendants in the Court of Chancery, as well as the complainants, desired the direction and decree of that court, before they could safely act in the premises, is whether the complainants, who are legatees named in the last will of John R. Thomson, deceased, take specific or general legacies. The subject matters of the bequests were shares of stock in the New York and Baltimore Transportation Company, and joint bonds of the Delaware and Raritan Canal and the Camden and Amboy Railroad Companies. The characteristics of specific legacies being undisputed, the arguments of counsel have been confined to the considerations, whether the language employed by the testator, under the circumstances by which at the time he was surrounded, ascertained from the relation which he bore to the legatees, the nature of his property, and his presumed purpose not to die intestate as to any portion of his accumulations then existing or prospective, viewed and considered in connection with the general disposition he made of his estate, and with the whole texture of the will, manifest a clear intention on his part, that the stock and bonds given by him to the complainants, should be furnished to the objects of his bounty, out of the same species of securities which were held by him clear of

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encumbrance at the date of his will, and retained by him in that condition to the hour of his death, and vested by his will in trustees, on several special expressed trusts.

If such intention sufficiently appears from those considerations taken together, the respective legacies are specific, and the will cannot be carried into effect, without appropriating and handing over to the legatees, the *quantum* of stock and of bonds, directed to be given to them, in the condition in which they were found by the executors and trustees, after the death of the testator.

It is conceded, that if he had directed the trustees to give to his sisters, and nephew and niece, a certain number of shares of *his* stock, and to his friends five of *his* bonds, he thereby would have so individuated, by words, the property which he desired that his legatees should have *in kind*, that a serious question could not have been made about his intention. If, therefore, a like intention is fairly inferable from the language adopted, taken in connection with the several considerations already adverted to, the specific character of the legacies must be determined by such intention.

It appears that the will was made in July, 1862, only a few weeks anterior to the testator's death in September, and during, or shortly before, his last sickness, and probably after he had become unfitted, from disease, to engage in active business. He seems to have retained a perfect knowledge of the amount and nature of *his* property, and to have been peculiarly conversant with the value, as *investments*, of the stocks and bonds which he was about to bequeath. He manifestly designed to provide munificently for his wife, and to give to his sisters, and a nephew and niece, portions of his property, from which, in his judgment, they severally would reap ample returns. He likewise was mindful of five tried and valued friends, and wished to bequeath to each of them a moderate legacy, as expressive of his estimation of their worth. His confidence in the extent and productiveness of the securities that he held, is manifested by a provision in the will for the investment and ultimate disposition of *surplus interest* and dividends, which he supposed might remain

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after applying enough of his stock and bonds to discharge the legacies to the complainants, and after paying \$10,000 a year to his wife, and likewise an annuity of \$500 to his brother. His injunction to the executors and trustees, to hold the stocks and other investments in trust, for the purposes of the will, and not to *change* any of them, without the written request of his widow, is additional proof that he was fully satisfied with his own judgment in selecting valuable securities for his moneys, and that he wished those securities to be continued intact until his wife, the person who fully knew his mind on that subject, and who is chiefly interested in the future avails of his property, should determine that a change of any of them would be advantageous to the estate.

After directing the payment of his debts and appointing his executors, he commenced disposing of his property, by a specific legacy to his wife, of his books, pictures, plate, and household furniture of every kind, in his mansion-house at Princeton, and in and about his house at Washington, and all his horses and carriages. Then he gave, devised, and bequeathed all the rest and residue of his estate, real and personal, to his executors, their heirs, executors, and administrators, in trust, for certain uses and purposes. By this devise and bequest he transferred to them, as trustees, all the stocks, bonds, and other securities, which he possessed and was entitled to, having in his mind the purpose of directing them to *retain* those securities, for fulfilling the requirements of the trusts he was about to declare.

He then proceeded to specify the purposes to which the estate *thus* put in trust should be applied.

First. For his trustees to give to each of his three sisters, two hundred and fifty shares of the capital stock of the New York and Baltimore Transportation line, and to a nephew and niece each, one hundred and twenty-five shares of the capital stock of the said line; the testator, at that time, holding 3,680 shares of that stock unencumbered.

Secondly. To give to each of his five friends, whom he named, one bond of \$1000, of the joint companies, redeema-

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ble in 1889; he, the testator, then holding twenty-nine bonds of that description and class, also free and unencumbered; and likewise a large number of railroad and canal bonds, *then* in hypothecation.

The unencumbered bonds and shares were susceptible of delivery immediately after his death, while those in pledge could not be under the control of the trustees, until the debts, for which they were hypothecated, were paid. The significance of this method, in designating by an ear-mark, the property for his legatees, cannot be blinked or disregarded.

After directing his trustees to pay an annuity of \$500 to his brother during his natural life, he directs that from the income of the *residue of his estate*, provision shall be made for his wife, by paying her a fixed sum semi-annually. What is the natural import of that direction? What could the testator have meant, except that the fund from which her annuity was to arise, was the *residue* of the bulk of his estate put in trust, after taking from it the one thousand shares of New York and Baltimore Transportation stock, and the five '89 bonds of the joint companies? Did he contemplate that the dividends on that stock, and the interest accruing on those bonds, should constitute a part of the income from which the first semi-annual payment should be made to Mrs. Thomson? Could that stock and those bonds be properly considered as a portion of the estate, liable to be appropriated for furnishing *any* part of her annual income, upon a fair reading of that clause in the will in connection with the preceding and following clauses? If such disposition of the stock and bonds entered into the intention of the testator, what meaning is to be given to the words "*income of the residue of my estate,*" as the source from which the annuity should flow?

Again. If the legacies shall be held to be general, the testator died intestate as to the accruing dividends and interest on those securities held by him, which result is always to be avoided, if practicable; or he intended that the amounts thereof should fall into that undefinable surplus of income, which he directed his executors to invest in good securities, for appropriation by his wife in her last will among benevo-

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lent, religious, and charitable institutions. Can this instrument be fairly read, in the light of all the peculiar surrounding circumstances, and such intention be justly imputable to the testator?

The intention of a testator upon the subject of specific legacies, as in every question on the construction of wills, is the principal object to be ascertained, and it is therefore necessary, that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute a legacy specific. 1 *Roper on Leg.* 193.

This is not a technical arbitrary rule, to be answered only by the use of particular words and expressions, but is an embodiment of the general principles, by which the character of legacies should be tested and determined; each will resting, for correct construction, upon the language employed, and established surrounding, significant circumstances, if such exist.

It seems to me that the language used in creating and directing the trusts, was a clear reference to the stocks and particular bonds which Mr. Thomson possessed when he executed his will, and it shows he meant that the legacies should be discharged by his trustees handing over to the respective legatees, stock and bonds which they would find in his strong box after his death.

If, however, the *language* of the will does not of itself come up to the rule laid down in the books, the circumstances by which the testator was surrounded when the will was drawn, and the whole scope and texture of the instrument, taken in connection with the particular clauses of bequest, clearly indicate the intention for which the appellants and complainant contend.

It is the duty of this court to make such a decree as a majority of the members think the Court of Chancery should have made.

In the prayer of the bill, the complainants ask that the legacies of the stock and bonds may be declared to be specific legacies; and that the shares and bonds, together with the

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dividends, interest, and income, accrued and accruing thereon, may be transferred and paid to the several legatees thereof.

The decree of the Chancellor adjudging the legacies to be general, and that so much of the bill as prayed for the payment of the income and interest, be dismissed, should be reversed, and this court should decree the legacies to be specific, and that the income and interest should be paid to the legatees, according to the prayer of the bill. The papers should be remitted to the Court of Chancery, with such instructions.

M A R C H T E R M , 1862.

SAMUEL B. HUDNUT and GABRIEL H. SLATER, appellants,
and TOBIAS NASH, respondent.

1. The well settled rule in equity is, that if the *lender* comes into court seeking to enforce a usurious contract, equity will repudiate the contract. But if the *borrower* seeks relief against the usurious contract, the only terms upon which the court will interfere, are that he shall pay what is really and *bona fide* due.

2. A bill for foreclosure by a second mortgagee, making the first mortgagee a defendant, as against such first mortgagee, is, in effect, a bill to redeem, not to foreclose.

3. The first mortgagee is not a necessary, nor a proper party to a bill by a subsequent mortgagee, if the sole design of the suit is a foreclosure of the equity of redemption. Technically, all that can be asked in such case is, that the complainant be permitted to redeem the prior encumbrance.

4. Where, as in our practice, prior encumbrancers are permitted to be made parties to a bill for foreclosure and sale of mortgaged premises, if the first mortgagee, defendant in such bill, comes in with his mortgage, he simply assents to the relief prayed for by the complainant.

5. As against the first mortgagee, the relief prayed for will not be granted, unless by his consent, or upon payment of the amount actually due upon his mortgage.

6. Where, to a bill for foreclosure, the answer of the owners of the equity of redemption raises the defence of usury to the mortgage of a co-defendant, such answer is in the nature of a cross-bill, seeking relief against the usurious mortgage.

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7. Upon a bill filed by a second mortgagee for foreclosure, and seeking to avoid the first mortgage as usurious, no decree will be made declaring the usurious mortgage a valid encumbrance for the amount actually advanced, unless by the consent, express or implied, of the owners of the equity of redemption, to the proceedings.

8. But if the parties interested in the equity of redemption, concur in the prayer of the bill by resisting the usurious mortgage, and the cause is brought to final hearing upon the pleadings and proofs, a decree pronouncing the mortgage usurious, and declaring it an encumbrance only for the amount actually advanced, will not be reversed at the instance of the owner of the equity of redemption.

This was an appeal from a decree made by Whelpley, Chief Justice, sitting as judge in equity, in the Circuit Court of the county of Hunterdon. The bill was filed by Peter Polhemus to foreclose a mortgage given by Francis McCue and wife, on the 6th of April, 1858, to Elisha Warford, to secure the payment of \$600; and by Warford assigned to the complainant. The premises were subject to a prior mortgage given by McCue and wife to Tobias Nash, which mortgage, the bill alleged, was executed and delivered upon an usurious contract between McCue and Nash, and was, therefore, null and void as against the complainant, and no encumbrance upon the mortgaged premises. There was also a third mortgage in order of priority upon the premises, given by McCue and wife to Luther Opdyke, and by him assigned to John F. Tinsman, also one of the defendants. Subsequent to the date of these mortgages, McCue's right and interest in the premises were sold by the sheriff under an execution at law against him, and purchased by Samuel B. Hudnut and Gabriel H. Slater, the appellants. The holders of these mortgages, and the owners of the equity of redemption, were made defendants to the bill.

Tinsman answered, claiming the amount of his mortgage as a valid encumbrance upon the premises, setting up usury as a defence against the Nash mortgage.

Hudnut and Slater answered, claiming to be the owners of the equity of redemption, admitting the mortgage of the complainant, and also the mortgage of Tinsman to be valid en-

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cumbrances, but insisting that the mortgage of Nash was usurious and void, and that they purchased the premises at the sheriff's sale, with the understanding and belief that they were not subject to the encumbrance of the said mortgage.

The answer of Nash sets out the origin of the indebtedness from McCue, for which his mortgage was given, and avers that the money was advanced, and the mortgage taken upon the distinct understanding, that it should be the first encumbrance in order of priority upon the mortgaged premises, but refuses to respond to the allegation of the complainant's bill of complaint, that the mortgage is tainted with usury, and therefore null and void; and the said defendant insists that, by the laws of the state of New Jersey, and the rules of this court, he is not obliged to make answer unto the said allegation of the complainant's bill, inasmuch as he might thereby be subject to a penalty or forfeiture by the laws of this state.

Depositions having been taken, the cause was heard and argued by counsel upon the bill, answers, and proofs, when the following opinion was delivered by the court.

WHELPLEY, C. J. It is conceded, on the proof made, that Nash's mortgage was founded on an usurious contract, although the usury was not included in the mortgage, but took the shape of a note, given by way of bonus, which has not been paid.

That there was an usurious contract upon which the mortgage was given, is clear upon the evidence. The only question to be decided is, can the plaintiff and defendants avail themselves of the defence in this suit?

The bill is filed by the assignee of the second mortgage given by McCue and wife, against Nash, the first mortgagee, Tinsman, the owner of the third mortgage, and Hudnut and Slater, the purchasers of the mortgaged premises.

The bill charges, in general terms, that the Nash mortgage was executed upon an usurious contract, and void for that reason.

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Nash answered the bill, passing by the allegations in regard to the usury, neither admitting, nor denying it. Tinsman answers, and sets it up; so, also, do Hudnitt and Slater. Tinsman prays that he may have an opportunity to contest the Nash mortgage. Hudnitt and Slater pray the interference of the court to have the mortgage declared void.

If Nash had filed his bill to foreclose, and made the other defendants and Polhemus, defendants, and such proof had been made as in this case, there can be no doubt but that the defendants would have been entitled to a decree that his mortgage was void for usury. Then the usury could have been used as a defence to the action of Nash.

But if the defendants cannot avail themselves of the defence without the aid of a court of equity, they must waive the forfeiture, and consent to pay the amount actually due. 2 *Parson's on Con.* 404, and cases there cited in note C; *Rogers v. Rathbun*, 1 *Johns. Ch. R.* 367; *Fanning v. Dunham*, 5 *Johns. Ch. R.* 122; *Fulton Bank v. Beach*, 1 *Paige* 433. He that asks equity must do equity.

But if a party comes into court, and asks relief, the court will compel him to do equity, although the defendant has not demurred to the bill. The court does not require the party to ask the aid of this principle by demurrer, but will give relief at the hearing. *Morgan v. Schermerhorn*, 1 *Paige* 544; *Ruddle v. Ambler*, 18 *Ark.* 369.

When a bill is filed for relief against an usurious mortgage, it will be upon terms of paying, or offering to pay, what is really due.

So stern is the court against enforcing a forfeiture, that it was held, in *Mason v. Gardner*, 4 *Bro. Ch. C.* 436, that a cross-bill, filed by a defendant in aid of his defence, was bad on demurrer, for not offering to pay what was due. This, it will be perceived, was a case where it was set up by way of defence to a suit brought by the usurer. This case is cited with approbation in *The Fulton Bank v. Beach*, and is the law of the court. The same principle has been held in our own Court of Chancery. *Saxton's Ch.* 364.

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As against the complainant, beyond all question it is the duty of the court to decree for Nash's mortgage. The complainant's decree on his mortgage must be upon terms of paying Nash's mortgage, for the usury in this case was never paid.

Are the defendants, Tinsman, and Hudnit, and Slater, in any better situation to avoid the Nash mortgage, than the complainant?

In this suit they occupy both the situation of defendants and complainants. As defendants, they may contest the validity of the complainant's mortgage; that by the pleadings is put directly in issue. They are also complainants seeking relief upon their own mortgages, or, as owners of the equity, asking to have their property discharged of the usurious lien.

As to the Nash mortgage, they do not deny the loan of the money by Nash to McCue. They do not deny the execution of the mortgage in due form of law, and its record as prescribed by law, but they set up new matter, not responsive to any bill filed by Nash, not in answer to any allegation made by him; matter which the complainant had no right to set up to avoid the mortgage, without an offer to pay the amount due.

As to this new matter, they are occupying the position of complainants asking relief against Nash, that he may have the statute of usury applied to his mortgage.

Although they stand in the position of defendants nominally, that can make no difference. The defendant, Nash, did not voluntarily come into court to enforce his mortgage, and ought not to be deprived of the benefit of the principle because his antagonist occupies the nominal position of defendant, instead of that of plaintiff.

The defendants were all bound to answer the complainant's bill, if at all, at the same time. He could not lawfully pray relief against the Nash mortgage, without an offer to pay the amount due.

The defendant, Nash, was not bound to answer the allegations of the other answers. He could not have known what

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they contained, unless he deferred his answer until they were filed.

Where different encumbrancers, defendants in a foreclosure suit, wish to question the validity of their several encumbrances, a proper issue cannot be formed without a cross-bill filed by the defendant, wishing to contest the validity of the claim of his co-defendant. The defendant whose claim is attacked, ought not to be deprived of the benefit of his answer.

It is true in this case that Nash did not answer the bill of complaint, but he was not bound to do it; the particulars of the usurious contract were not set forth as required by the practice of the court. *Story's Eq. Pl.*, § 393-9.

Regularly, the prayer of an answer is only to be dismissed from the court with his costs.

But the court has, in modern times, dispensed with the necessity of a cross-bill in cases where the whole matter is before the court, and the party is not thereby deprived of any of his substantial rights by a decree in the existing suit. *Ames v. New Jersey Franklinite Co.*, 1 *Beas.* 66; *Elliot v. Pell*, 1 *Paige Ch.* 268.

But the court will never dispense with a cross-bill where any of the defendants would be prejudiced by the want of one.

This is a peculiar case. The complainant might have proceeded without making Nash a party defendant. In that case the property would have been sold subject to his mortgage, and he would have been forced to assume the position of a complainant in equity, or plaintiff at law; in either of these cases the defendant might have set up usury as a defense. But the complainant has, for the purpose of disposing of his claim in this suit, made him a party defendant.

No decree can be made in this suit, except such an one as is grounded upon the prayer of the complainant's bill. The other defendants can have no relief to which the complainant is not entitled, and we have already seen that he is only entitled to a decree upon the basis of paying the amount due.

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All the parties in this case ask for a decree upon the bill, answers, and proofs, as they stand. I think there must be a decree for the payment of all the mortgages, in the order of their priority. I cannot see my way clear to make any other decree.

The complainant cannot object to this decree. He brought Nash into court unnecessarily; he has come in and submitted to have such a decree made as the complainant is lawfully entitled to; he is not interested in the other encumbrances, as he is entitled to priority over them.

The other defendants, Tinsman, and Hudnit, and Slater, have not objected to his being a party to this suit in the capacity of a defendant, clothed with all the rights of a defendant. They have not asked the court for a decree subject to the rights of Nash, or to have him stricken from the bill as an improper or unnecessary party, but have asked for a decree of the court upon his rights in this suit. I think they have no cause of complaint, if this court does equity between all the contending parties.

What that is, seems to be free from doubt. The claims of all should be paid out of the proceeds of the sale, in the order of their priority.

Let there be a reference to a master to ascertain the amount due on all the encumbrances, and decree accordingly.

The following decree was thereupon made:

This matter coming on for argument at the regular April Term of this court, held at Flemington, in and for the county of Hunterdon, in the year of our Lord one thousand eight hundred and sixty-one, in the presence of George A. Allen, esq., of counsel with the complainant, Bennet Vansyckel, esq., of counsel with Tobias Nash, Alexander Wurts, esq., of counsel with John L. Tinsman, and Edward R. Bullock, esq., of counsel with Samuel Hudnit and Gabriel H. Slater, defendants, and the bill, answer, and proofs being read, and the argument of the said counsel being heard, and the court having taken to this time for consideration, and being now of opinion that

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the objections taken to the mortgage given by the said Francis McCue and wife to said Tobias Nash are inequitable, and should not prevail, but that the said mortgage, as well as the other mortgages set up in the pleadings, should be held to be encumbrances on said mortgaged premises in the order of their priority, and which said order appears from the said proofs and exhibits. It is, therefore, on this eighth day of April, in the year of our Lord one thousand eight hundred and sixty-one, by the said Circuit Court of the county of Hunterdon, ordered, adjudged, and decreed, that the said mortgages are, and the same are hereby declared to be valid and subsisting encumbrances on the premises described therein, and are entitled to priority and payment out of said premises in the following order, that is to say: In the first place, the principal and interest money mentioned in and secured by the said bond and mortgage of the said Tobias Nash, together with his taxed costs, is to be paid. In the second place, the principal and interest money mentioned in and secured by the said bond and mortgage of the said complainant is to be paid, together with his taxed costs. And in the third place, the principal and interest money mentioned in and secured by the said bond and mortgage now held by the said John L. Tinsman, assignee, &c., together with his taxed costs, is to be paid. And it is further ordered, that for the purpose of making said moneys, a sale be made of said mortgaged premises, and that for the purpose of ascertaining the amounts due and to grow due on said mortgages, respectively, that it be referred to Charles Bartles, one of the masters of the Court of Chancery of New Jersey, who is hereby directed to report thereon with all convenient speed.

Hudnut and Slater, the owners of the equity of redemption, appealed from that part of the said decree, which adjudges that the mortgage of Tobias Nash was, and is, a valid and subsisting encumbrance upon the mortgaged premises in the pleadings mentioned, and entitled to payment out

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of said premises according to its priority. Nash answered the petition of appeal.

Mr. Wurts, for appellants, cited *Nix. Dig.* 552, § 6; *Constitution, Art. VI, Sec. II*, § 5, 6; *Art. VI, Sec. V*, § 3; 4 *Bro. Ch. R.* 436; *Wortman v. Skinner*, 1 *Beas.* 362; *Ames v. N. J. Franklinite Co.*, *Ibid.* 67, 160; *Grosvenor v. The Flax and Hemp Man'g Co.*, 1 *Green's Ch. R.* 453; *Roberts v. Goff*, 4 *Barn. & Ald.* 92; 2 *Parsons on Con.* 404; 1 *Beas.* 31, 67; 3 *Halst. Ch. R.* 531.

Mr. B. Vansyckel and *Mr. Beasley*, for respondent, cited *Rogers v. Rathbun*, 1 *Johns. Ch. R.* 367; *Eagleson v. Shotwell*, *Ibid.* 537; *Fanning v. Dunham*, 5 *Johns. Ch. R.* 122; *Fulton Bank v. Beach*, 1 *Paige* 429, 433; *Morgan v. Schermerhorn*, *Ibid.* 546; *Post v. Bank of Utica*, 7 *Hill* 391; *Rexford v. Widger*, 3 *Barb. Ch. R.* 641; *Remer v. Shaw*, 4 *Halst. Ch. R.* 355; 3 *Daniell's Ch. Pr.* 1342; *Story's Eq. Pl.*, § 392-3; *Pattison v. Hull*, 9 *Coven* 747; *Story's Eq. Pl.*, § 392, note 2; *Ames v. The N. J. Franklinite Co.*, 1 *Beas.* 66; *Elliott v. Pell*, 1 *Paige* 268; *Collard v. Smith*, 2 *Beas.* 43; 8 *Paige* 453; 4 *Paige* 526; 2 *Daniell's Ch. Pr.* 752, note 2; 2 *Green's R.* 503; 3 *Wend.* 579.

The opinion of the court was delivered by

GREEN, C. A bill of foreclosure was filed in the court below by the second mortgagee. Nash, the first mortgagee, and Hudnit and Slater, the appellants, the owners of the equity of redemption, were made parties, defendant. The bill alleged that the mortgage of Nash was void for usury. It prayed a sale of the mortgaged premises for the payment of the complainant's debts, and a foreclosure of the equity of redemption against all the defendants. The appellants, Hudnit and Slater, by their answer, claimed to be the owners of the equity of redemption. They admitted the complainant's mortgage, but insisted that the mortgage of Nash was void for usury, and constituted no encumbrance upon the mortgaged premises. The cause was brought to final hearing

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upon the pleadings and proofs. The evidence showed that the mortgage of Nash was tainted with usury; the mortgagee having received, in addition to the mortgage for \$1500, the sum advanced, a note for \$200 as a bonus or additional consideration for the loan of the money. The court held that upon the state of the pleadings, the defence of usury was not available, and that the mortgagee was entitled to a decree for the sum actually advanced upon the mortgage loan.

The well settled rule in equity is, that if the lender come into a court of equity seeking to enforce a usurious contract, equity will repudiate the contract. But if the borrower seeks relief against the usurious contract, the only terms upon which the court will interfere are, that he shall pay what is really and *bona fide* due. The court acts upon the principle that it is against conscience that a party should have the relief which he asks against the contract, and at the same time keep the money which he received upon it. If he asks equity, he must do equity. If, therefore, a mortgagee asks to foreclose a usurious mortgage against the mortgagor, and the usury is established as a defence, the court will declare the contract void. But if the mortgagor asks the court to redeem the mortgaged premises, or to relieve the premises from the encumbrance of the mortgage, the relief asked for will be granted only upon the payment of the amount actually due upon the mortgage debt.

Nash, in this case, was the first mortgagee. He did not come into court asking to foreclose his mortgage. But a subsequent encumbrancer, a party holding the right of redemption, filed a bill to foreclose his mortgage, and made the first mortgagee and the owners of the equity of redemption, parties. Now as against the first mortgagee, this is not a bill to foreclose, but to redeem. He was not a necessary, nor a proper party to the suit, if the sole design was a foreclosure of the equity of redemption. The real design and effect of making him a party was, that his mortgage should be redeemed, or the encumbrance removed from the premises. Technically, this is all that could be asked as against him. And in the Irish Court of Equity where, as with us, the

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mortgaged premises are sold under a bill of foreclosure, the bill is demurrable, unless the complainant offers to redeem. Under our practice, doubtless, the prior mortgagees are made parties to avoid multiplicity of suits, and so that the premises may be sold free from encumbrances, and most advantageously for the interests of the owner of the equity of redemption. But still, in strict technicality, and in its practical operation, the bill as against the first mortgagee, is a bill for redemption, not for foreclosure. The mortgage is redeemed, not technically, by the payment of the debt in advance by the complainant, but the same result is reached by its being paid or redeemed first in order out of the proceeds of the sale. By coming in with his mortgage, the first mortgagee assents to the relief prayed for by the complainant. Beyond that he asks no relief. As against him, the relief sought for will not be granted unless by his consent, or upon payment of the amount actually due upon his debt.

But it is said that the appellants, who had acquired the title of the mortgagor, and were the final owners of the equity of redemption, were also defendants in the suit, and that, as against them, the decree is illegal, because it establishes the usurious mortgage as against their rights. But so far as the interests of Nash were concerned, they assented to, and concurred in, the prayer of the bill. They insisted that the mortgage was usurious and void as against their interests. Admitting that they had a right to raise the defence of usury as against their co-defendant, their answer was in the nature of a cross-bill, and as such, in its operation, it was a prayer for relief against the Nash mortgage. Standing in the shoes of the mortgagee, they sought to relieve their title to the equity of redemption from the encumbrance of that mortgage. The whole design of the answer, and of all the evidence offered, was to obtain relief against the Nash mortgage. Clearly, the decree could not have been made, except by the assent, expressed or implied, of all the parties interested in the equity of redemption. All the subsequent encumbrancers to Nash, and the owners of the equity of redemption, were before the court upon final hearing, asking a fi

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decree upon proof of usury in the mortgage of Nash, who had been brought before the court simply that the premises might be relieved from his encumbrance. That was the design of the bill. That must have been the effect of the decree. Under these circumstances the court did what is admitted to be equitable. They declared that the holder of the mortgage shoud recover only the amount actually due.

It is now urged that the court should simply have dismissed the bill as against the first mortgagee. That is doubtless what would have been done, had either of the parties asked for it at a time when it could have been done without prejudice to the rights of the first mortgagee. But the parties had all voluntarily submitted their rights to the final disposition of the court, upon the pleadings and proofs, as they then stood. No one asked the relief which it is now insisted should have been afforded. They all asked a final disposition of the question, at the hands of the court. It was so disposed of, and in accordance with the principles of equity. Nash recovers nothing more upon his mortgage than he actually advanced. He took the mortgage for the precise sum loaned. The usury consisted in taking a note by way of bonus, which has not been paid, and is clearly valueless.

Under these circumstances, it is not perceived upon what ground these appellants can complain. They voluntarily submitted their rights to the final adjudication of the court, in the shape in which they were presented. They asked equitable relief, and they obtained it. By a reversal of the decree, Nash could not be restored to the position in which he stood before the decision in the court below. His legal rights have been virtually adjudicated. There was no difficulty in the appellants enforcing their legal title in a court of law. They might have brought ejectment, and held the premises under their title. They voluntarily submitted to an adjudication of their rights in equity. They are here in support of a strictly legal right, seeking to enforce a penalty against the respondents, to retain the whole loan of \$1500,

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and not pay a farthing of the debt. The evidence shows that in every aspect their case is destitute of all pretence of equity. They never suffered the loss of a dollar from the usury. It never operated against them. As they ask merely to enforce the penalty of the law against Nash, they cannot complain that the strictest and most technical rules should be enforced against them. Clearly, the decision of the case was made upon the sharpest technicality, upon the very *apices litigandi*, and not in accordance with the usual practice of the court when equitable interests are to be protected. If any equitable interest of these appellants had been affected, it is safe to assume that the decree never would have been made. But as the case stands, there is no reason in equity why the decree should not have been made, and certainly none why it should now be set aside to the prejudice of the respondent.

I think the decree should be affirmed.

Decree affirmed by the following vote :

For affirmance—The CHANCELLOR, Judges BROWN, ELMER, HAINES, OGDEN, SWAIN, VAN DYKE, VREDENBURGH, WOOD—9.

For reversal—COMBS, CORNELISON, KENNEDY—3.

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ABANDONMENT.

1. There may be a *constructive* abandonment or separation, while the parties continue under the same roof. *Anshutz v. Anshutz*, 162
2. The conduct which will justify the wife in abandoning her husband must be such as would constitute a ground for divorce or alimony. *Moores v. Moores*, 275

ACCOUNT.

See EXECUTORS AND ADMINISTRATORS, 1, 7, 9, 10, 11, 12.

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See PARTNERSHIP, 4.
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AGREEMENT.

1. The validity of a contract must

- depend upon the laws of the state where the contract was made. *Attwater v. Walker*, 42
2. Where the contract upon its face is strictly legal, it will not be presumed that the parties had in contemplation an illegal stipulation. *Diercke v. Kennedy*, 210
3. The omission of one of the legatees to sign the agreement will not invalidate it as against those who did sign it, they having derived all the benefit sought by the arrangement, and having incurred no additional burden or loss. *Woodward's adm'r v. Woodward's ex'res*, 84
4. A court of equity ought not to enforce the specific performance of a contract for the purchase of land, under a sale which a competent tribunal had pronounced unauthorized and illegal. *Young's adm'r v. Rathbone*, 224
5. Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. Specific performance is frequently decreed, where the terms for the completion of the contract have not, in point of time, been strictly complied with. 225
6. Where the time fixed for the delivery of a deed has passed, and the circumstances have materially changed, a vendee acting in good faith will not be compelled to accept a deed against his will, which he was ready and willing to accept at the time fixed for the performance of the contract. *Ib.*
7. The general principle is, that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. But

- the principle does not apply where the contract, by its terms, gives to one party a right to the performance, which it does not give to the other. *Van Doren v. Robinson*, 256 Ib.
8. Where the obligation to perform rests upon one of the parties only, equity will enforce the contract with great caution. *Ib.*
9. An agreement for the sale of land at a price *to be ascertained by the parties*, is too incomplete and uncertain to be carried into execution by a court of equity. But where the contract is, that land shall be conveyed "at a fair price," or "at a fair valuation," the court will direct the valuation to be made by a master, and will enforce the execution of the contract. *Ib.*
10. The true principle seems to be, that whenever the price to be paid can be ascertained in consistency with the terms of the contract, performance will be enforced. But the court will not make a contract for the parties, nor adopt a mode of ascertaining the price not in accordance with the spirit of the agreement. *Ib.*
11. A mere personal contract, not running with the land, nor binding the alienee at law, will be enforced against the alienee in equity, only where he is chargeable with notice of the contract. *Ib.*
12. Where the covenantee in a contract for the conveyance of land, permits a purchaser to acquire title, take possession of the premises, and pay the purchase money, without an intimation of his claim under the covenant, or of his willingness to accept the title, he has no claim to relief in equity. 257
13. Equity will relieve against a contract made under a mistake, or ignorance of a *material fact*: not only where there has been a concealment of facts by one party, but also in cases of mutual mistake or ignorance of facts. *Nicholson v. Jane-way*, 285
14. To constitute a fraud or mistake, for which equity will relieve against a contract, it is essential that the fact misrepresented or concealed be *material*. It must either affect the substance of the contract, or the value of the thing bargained for;
- or be such as induces the party aggrieved to pay more, or accept less, for the thing bargained for, than its real value. *Ib.*
15. Equity will not grant relief against a contract on the ground of mistake, when the mistaken fact did not operate as an inducement to enter into the contract. *Ib.*
16. An engagement by a contracting party that he will not do any act to the prejudice of the other contracting party, without his consent, is, in effect, identical with an absolute and unqualified engagement not to do the act. *Delaware and Raritan Canal Co. v. Raritan and Delaware Bay Co.*, 322
17. Parties cannot effect by combination what neither can do lawfully. Nor can they effect by the agency of others, what they may not do themselves. *Ib.*

See CORPORATIONS, 1, 2, 3, 5, 13.

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MORTGAGE, 8, 9, 10.

SALE OF LAND, 8, 9.

SPEC. PERF., 1, 3, 6, 7, 10.

ALIMONY.

1. This court has *original jurisdiction* in the matter of alimony, *only* where the husband without any justifiable cause abandons his wife, or separates himself from her, or refuses and neglects to maintain and provide for her. *Anshutz v. Anshutz*, 162
2. The abandonment or separation on the part of the husband, as well as the refusal to support the wife, must be charged in the bill and be sustained by the proof. *Ib.*
3. While the parties continue to live together, no measure of unkind or harsh treatment, which will not constitute valid ground for a divorce, will entitle the wife to alimony. *Ib.*
4. A bill for alimony independent of the statute, except as incidental to some other relief which may give the court jurisdiction, will not be entertained. *Ib.*

See PRACTICE, 38, 39, 40, 41.

AMENDMENT.

See PLEADING, 42.
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ANSWER.

See PLEADING, 5, 7, 12, 20 to 25, 35, 38.
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SPEC. PERF., 10.

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See PRACTICE, 72.

ASSIGNEE AND ASSIGNMENT.

See CREDITOR AND DEBTOR, 2.
MORTGAGE, 3, 4.

ASSIGNMENT FOR BENEFIT OF CREDITORS AND FRAUDULENT TRUSTS.

An insolvent debtor having been arrested in Virginia, and being in custody by virtue of a *capias ad satisfaciendum*, petitioned for his discharge under the insolvent laws of that state, and having taken the oath of insolvency, and tendered and subscribed a schedule of all his property, real and personal, did further, in pursuance of the requirements of the insolvent laws of said state, and in order to his discharge as an insolvent, execute and deliver to the sheriff, by whom he was held in custody, a deed for certain real estate in New Jersey, described in said schedule. Upon a bill filed in this court to compel the execution of the trusts upon which the said deed was executed,
Held—

1. That a general assignment by a debtor, of all his real and personal property, under the insolvent laws of Virginia or of any other state, can pass no title to real estate in New Jersey. *Hutchson v. Peshine*, 167
2. The deed to the sheriff, though absolute upon its face, was merely *ancillary* to the general assignment, burdened with the same

trusts, and designed to carry the assignment into effect. Independent of those trusts, and of the provisions of the statutes of insolvency, the deed is without consideration and void. *Ib.*

3. The deed is not merely fraudulent as against subsequent creditors, but it is illegal and inoperative as a transfer of title to real estate, and the trustee under it will neither be recognized nor executed by the courts of this state. *Ib.*
4. This court will not administer trust funds created under the laws of another state, and growing out of the sale of real estate situate in New Jersey, in direct conflict with the laws of this state, to the prejudice of creditors residing here. *Ib.*

ATTACHMENT.

See PRACTICE, 19.
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See PLEADING, 11.

BILL QUIA TIMET.

See PRACTICE, 47.

BONA FIDE PURCHASER.

See PURCHASER, 1, 4.
SALE OF LAND, 2.

BOND.

1. In an *action at law* upon a penal bond, with condition for the payment of money only, the plaintiff is entitled to recover the full amount of the penalty as a *debt*, and the excess of interest beyond the penalty in the shape of *damages* for the detention of the debt. *Long's adm'r v. Long*, 59
2. Upon a *bill in equity* for the recovery of a bond debt, either upon the bond itself, or upon a mortgage given to secure the bond, the obligee may recover the *full amount*

of principal and interest due upon the bond, though it exceed the amount of the penalty. *Ib.*

3. Though the delivery of a bill or note, either of the debtor or of a third party, is not payment of a precedent debt, but merely suspends the remedy, yet if the holder be guilty of laches, it operates as a complete satisfaction. *Shipman v. Cook,* 251

4. Where the note of a third party is endorsed by a mortgagor to the mortgagee, and is accepted by him as a conditional payment upon the bond, the mortgagor is entitled, as endorser, to a notice of protest or dishonor. If the holder of the note fail to give such notice, the mortgagor is discharged not only from liability as endorser, but also from liability *pro tanto* upon the bond. *Ib.*

5. If such a note be accepted as absolute payment on the bond, and the payment of the note be guaranteed by the mortgagor, the guaranty will not restore the obligation. The mortgagor would be liable on his contract of guaranty, but his indebtedness upon the bond and mortgage would not be revived. *Ib.*

See HUSBAND AND WIFE, 10, 11, 19.

BURTHEN OF PROOF.

See PRACTICE, 38.

CESTUI QUE TRUST.

See EXECUTORS AND ADMINISTRATORS, 2.

PLEADING, 17, 18.

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WILL, 10.

CHARTER.

1. The making and filing of the survey required by the 5th section of the act incorporating the "Morris Canal and Banking Company," (*Pamph. L.*, 1824, p. 160,) is a necessary prerequisite to the taking

of any lands under the powers given by the charter. *Morris Canal and Banking Co. v. Central Railroad Co.,* 419

2. As a rule of construction, the legislature ought to be considered as intending to grant, by a charter of incorporation, such powers only as are necessary or useful to the end or object which they had in view in creating the corporation. They ought not to be understood as granting anything more, unless the intention to do so is plainly expressed, or beyond a doubt. *Ib.*

3. In public grants the grantees can take nothing not clearly given him by the grant. In cases of doubt, the grant is construed in favor of the state, and most strongly against the grantees. *Ib.*

4. The third section of the "act to incorporate the Associates of the Jersey Company." (*Pamph. L.*, 1804, p. 370,) enacts as follows: "That the said Associates shall have the privilege of erecting or building any docks, wharves, and piers, opposite to, and adjoining the said premises in Hudson river, and the bays thereof, as far as they may deem it necessary for the improvement of the said premises, or the benefit of commerce, and to appropriate the same to their own use." *Held,* that this section merely gave the Associates a privilege or license to build docks, wharves, and piers, in the waters of the Hudson river, and the bays aforesaid, in the manner therein mentioned, and when so built to appropriate them to their own use, and conferred upon them no power to transfer or convey such privilege or license to any other corporation. *Held further,* that the land not so occupied and built upon was not granted to the Associates, and that the same and all rights in and over it remain in the state as before. *Ib.*

See CORPORATIONS, 1, 9, 10.

CONTRACT.

See AGREEMENT.

CORPORATIONS.

1. Where, at the time of the grant of a charter to a corporation, there is a general law of the state, that the charter of every corporation granted by the legislature shall be subject to alteration, suspension or repeal, in the discretion of the legislature, the legislature, in granting such charter, must be deemed to have reserved to themselves the right of altering, suspending, or repealing the same, whenever, in their discretion, the public good may require it, as fully as if the reservation were inserted in the charter. And all contracts, express or implied, resulting from the act of incorporation and its acceptance by the stockholders, must be deemed to have been entered into by both parties, subject to that reservation. *Story v. Jersey City and Bergen Point Plank Road Co.* 13
2. Whatever limitation may exist to the reserved right of the legislature to alter or repeal a contract, such reservation is in itself valid, and this court ought not, upon a motion for a preliminary injunction, to pronounce any alteration, suspension, or repeal of the charter, to be unconstitutional or illegal. Much less should this court make such declaration in advance of any actual legislation. 14
Under the provisions of the charter of incorporation of the Jersey City and Bergen Point Plank Road Company, *Pumpk. Laws*, 1850, p. 255, and the supplements thereto, *Laws*, 1851, p. 288, and 1860, p. 392, and of the charter of incorporation of the Jersey City and Bergen Railroad Company, *Laws*, 1859, p. 411, and the supplement thereto, *Laws*, 1860, p. 393—
Held, that the occupation of a part of the ancient highway on which the plank road is constructed, by the railway, with the consent of the plank road company, without the personal consent of a stockholder, the plank road company having been authorized by the legislature to lay rails upon their road, is no violation of the rights of such stockholder.
Held also, that the sale by the plank
- road company of the whole or a part of their road to the railroad company, without the personal consent of a stockholder, is not such an infringement (if any) of his rights as this court will interfere to restrain by injunction.
Held further, that a change of the route of the plank road by authority of the legislature, at the instance of the plank road company, is not a fundamental change of the objects of the company, or a fundamental alteration of the structure thereof, which equity will restrain at the instance of a stockholder. *Ib.*
3. A member or director of a corporation may make contracts with it, like any other individual, and when the contract is made, the director stands, as to the contract, in the relation of a stranger to the corporation. *Stratton v. Allen*, 229
4. Corporations that have the power to borrow money, have also the necessary power, as well as the legal right, to give obligations for its repayment in any form not expressly forbidden by law. The fact that the security was given, and the judgment confessed to a director, cannot destroy its validity. *Ib.*
5. The phraseology of the clause under which the exclusive privileges are claimed by the complainants, "it shall not be lawful, &c.," (*Pumpk. L.* 1832, p. 80,) is the form in which the faith of the state is usually pledged, and in which contracts with corporations, touching the exercise of exclusive franchises under legislative authority, are entered into. It is none the less obligatory that it is not in *form* a contract. *Del. & Rar. Canal Co. v. Rar. & Del. Bay Co.*, 321
6. The legislature cannot divest itself or its successors, of its sovereignty, or extinguish the trusts committed to its custody for the public welfare. It not only may, but must determine in what manner that sovereignty shall be exercised, and how those trusts shall be executed. *Ib.*
7. By the grant of exclusive privileges to the joint companies, the legislature in no proper sense dero-

- gated from the power of subsequent legislatures to provide highways. The legislature have the same control over their franchisees and property as over those of any other citizens, and they may be taken and condemned for public use upon making just compensation. *Ib.*
8. If a corporation goes beyond the powers with which the legislature has invested them, and in a mistaken exercise of those powers interferes with the rights or property of others, equity is bound to interfere by injunction if the exigency of the case require it. Whether those rights are invaded by a mistaken or fraudulent exercise of power is immaterial. 322.
9. The legislature cannot be presumed by a charter to intend or contemplate any grant inconsistent with, or that would operate as an invasion of, a grant already made. *Ib.*
10. The clause in the charter of incorporation, rendering the *consent of the companies necessary* to legalize the construction of a competing road, cannot affect the validity of the law as an act of legislation. Their *assent* is no part of legislation. It does not create the law, but merely avoids the constitutional objection to its validity. *Ib.*
11. By the act of 1851 (*Pamph. L. 388.*) supplementary to the act entitled "an act relative to the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Companies," the true intent and meaning of the said last mentioned act, are declared to be "fully and effectually to protect, until the first day of January, 1869, the business of the said joint companies from railroad competition between the cities of New York and Philadelphia." *Held,* the grant of this exclusive privilege operates only to protect the through business *from city to city*, and not between intermediate places and over any and every part of the route between the said cities. The franchise is *exclusive* only in regard to passengers and merchandise transported over the entire route. *Ib.*
12. But even if the exclusive privilege also extend to way business,
- still a competing route business is not a nuisance so near the route of the ant's road as *materially* to take away its custom.
13. It is a well settled rule that public grants be construed strictly; & cases of grants of franchises of the public to a private company, the established rule of construction is, that any ambiguity in the contract must operate in favor of the corporation, in favor of the public. The corporation being that which is not clearly named in the act.

See CHARTER.

COSTS.

*See PRACTICE, 3, 4, 7, 24
SALE OF LAND, 3.
WILL, 4.*

CREDITOR AND DEBTOR.

1. Where a creditor comes into possession of the property of his debtor to remove fraudulent encumbrances out of it, his execution at law, the decree is simply to declare the property in preference to all other creditors, and to cancel the fraudulent encumbrance. *Smith v. Freeland.*
2. Where a debtor wilfully creates greater liability than exists, or conceals the existence of a debt, such concealment or creation will be absolutely conclusive in favor of an assignee, if made known to him in accepting the instrument. *Diercks v. Kennedy.*

*See ASSIGNMENT FOR BENEFIT OF CREDITORS AND FRAUDULENT CONVEYANCES, 4.
HUSBAND AND WIFE, 1.
INSOLVENT CORPORATION, 1.
MARRIED WOMEN, 10.
PARTNERSHIP, 6.
PRACTICE, 15 to 19, 67.
PLEADING, 30, 31, 34.
TRUST AND TRUSTEE, 2.*

CROSS-BILL.

See PLEADING, 21, 22.
PRACTICE, 90.

DECREE.

See PRACTICE.
PURCHASER, 9.

DECREE OF DISTRIBUTION.

See PRACTICE, 70 to 82.

DEED.

1. The familiar principle of the common law, that in the creation of an estate by *deed* the word "heirs" is necessary to pass the fee, has not been altered in this state by statute, nor has it been modified or relaxed by judicial construction. No synonym can supply the omission of the word "heirs," nor can the legal construction of the grant be affected by the intention of the parties. *Kearny v. Maromh*, 189
2. An instrument conveying lands absolutely, not as security for money, nor to be held in trust for its repayment, but *in lieu* of it, is a deed. No subsequent event can convert it into a mortgage. *Ib.*
3. A husband and wife, by deed of trust, conveyed the legal title to certain real estate to the trustee *for life*, and by the same deed, in terms, constituted the trustee attorney irrevocable, in the name of the grantors, or either of them, in conjunction with the grantors, to convey the land. *Held*, that as respects the wife, the power *as such* was a nullity. She could not convey by letter of attorney. *Also*, that it can only serve as evidence of an intention on the part of the grantors, to confer upon the trustee a power of sale. *Further*, the trustee has no power of sale under the deed. *Ib.*
4. Where the defendant claims title through a deed which contains the covenant sought to be enforced, he is chargeable with constructive notice of the covenant. *Van Doren v. Robinson*. 256
5. Notice of a deed is notice of its contents, and where a purchaser cannot make out a title but by a deed which leads him to another fact, he will be deemed to have knowledge of that fact. 257
6. Constructive notice is knowledge imputed or presumption, too strong to be rebutted, that the knowledge must have been communicated. *Ib.*
7. Where it appears that the adjunct of quantity in a deed is used as *description* merely, and not as indicating the precise contents of the land conveyed, a mere deficiency in the quantity is not of itself evidence of a fraudulent intent. *Weart v. Rose*. 290
8. Where it appears by definite boundaries, or by words of qualification, that the statement of the quantity of acres in a deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case. *Ib.*
9. Where land is sold by certain boundaries, or for so much for the entire parcel, any surplus over the quantity given belongs to the vendee, and the price cannot be increased or diminished on account of disagreement in measure or quantity. *Ib.*
10. Where the vendor agrees to convey a farm in gross, "containing about one hundred and fifteen acres of land," and the deed executed in pursuance of the agreement describes the land by boundaries, and adds, "containing about one hundred and fifteen acres of land," a deficiency of 6.12 acres will not entitle the purchaser to an abatement of the purchase money. 291

See AGREEMENT, 6.
HUSBAND AND WIFE, 7.
SHERIFF'S SALE, 8.

DEMURRER.

See PLEADING, 3, 10, 13, 14, 15, 30, 31,
36, 39, 40, 41, 42.

DESERTION.

The mere separation of husband and wife does not constitute desertion within the meaning of the statute. To constitute desertion, the wife must absent herself from her husband of her own accord, without his consent and against his will. *Moores v. Moores,* 275

See DIVORCE, 3.

DISCOVERY.

*See EXECUTORS & ADMINISTRATORS, 7.
PLEADING, 21, 31, 40.
SHERIFF'S SALE, 7.*

DISTRIBUTIVE SHARE.

1. A bill in equity by the next of kin, for the distributive share of an estate in the hands of an administrator, will be sustained, where no decree for distribution has been made. *Frey v. Demarest,* 236
2. The statutory remedy by suit at law for the recovery of a legacy or a distributive share of an estate is *cumulative*, and was not designed to limit or qualify the ancient jurisdiction of the court of equity over the subject. *Ib.*

DIVORCE.

1. A citizen of another state, bringing his effects into this, to establish a residence here, with the manifest intent of procuring a divorce, and immediately commencing a suit for that purpose, is not an inhabitant or a resident of this state, within the meaning of "the act concerning divorces" (*N.J. Dig. § 1.*) *Winship v. Winship,* 107
2. Under such circumstances, this court will not maintain jurisdiction of a suit for divorce, though the charge of adultery be clearly proved against the defendant. *Ib.*
3. A bill will not lie for divorce on the ground of desertion, where the parties are living apart under articles of separation or by mutual agreement, and where the party

seeking it has not expressed a desire to terminate the agreement. *Moores v. Moores,* 276

See PLEADING, 23, 37.

DRUNKENNESS.

See PRACTICE, 35 to 37.

ELECTION.

1. The heir-at-law of the testator, claiming a legacy under the will, and also claiming real estate as heir-at-law against the will, the will being inoperative as to real estate by reason of a defective execution, the heir will not be put to his election, but will take both the legacy and the land. In such case the heir will not be required to give up the legacy, unless the legacy was bequeathed upon an express condition to give up the real estate. *Kearney v. Macomb,* 189
2. Where a suit is pending for the same cause in a court of law, all that the defendant can ask, is an order putting the complainant to his election, whether he will proceed at law or in equity. *Way v. Bragaw,* 213
3. The complainant will not be put to his election, unless the suit at law is for the same cause, and the remedy afforded co-extensive and equally beneficial with the remedy in equity. *Ib.*

See WILL, 10.

EQUITY OF REDEMPTION.

See PRACTICE, 90, 91, 92.

ESTOPPEL.

See PURCHASER, 11.

EVIDENCE.

1. The evidence of an alleged paramour, being *particeps criminis*, is but weak. But neither his evi-

- dence, nor that of the woman charged with adultery, is to be rejected on the assumption that they are guilty. *Berckmans v. Berckmans*, 122
2. Express testimony cannot be rejected on the sole ground of its improbability. Its impossibility alone can discredit the witness. *Ib.*
3. A witness must state facts, not inferences, and the court can draw no inferences, which the facts as proved do not justify. *Ib.*
4. The testimony of one witness uncorroborated, unsupported, and in its details improbable, is not sufficient to establish the charge of adultery, against the full and explicit counter testimony of the person accused and her *particeps criminis*. *Ib.*
5. It is not necessary that the offence should be proved in time and place as charged in the bill. The mind of the court must be satisfied that actual adultery has been committed, but if the circumstances establish the fact of general cohabitation, it is enough, although the court may be unable to decide at what time the offence was committed. *Ib.*
6. *Parole evidence* of the declarations of a *particeps criminis*, even though he has confessed his guilt, is not competent evidence against the party charged with adultery. *Ib.*
7. To establish the existence of adultery, the circumstances must be such as would lead the guarded discretion of a reasonable and just man to that conclusion. It must not be a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations. *Ib.*
8. The facts proven must be such as cannot be reconciled with probability and the innocence of the parties. *Ib.*
9. Mere imprudence, indiscretion, or folly, is not conclusive evidence of guilt. The mind of the court must be satisfied that there was an intimacy between the parties entirely inconsistent with the duty which a virtuous wife owes to herself and to her husband. *Ib.*
10. When the conduct of a party admits of two interpretations equally consistent with probability, the one involving guilt and the other consistent with innocence, the rules of evidence as well as the dictates of justice require that the interpretation should be favorable to innocence. *Ib.*
11. In the investigation of a wife's guilt, the conduct of the husband is always regarded as a most significant circumstance. So long as there is reasonable doubt of her guilt, or a plausible ground for a hope of her innocence, the husband's forbearance is both excusable and laudable. But when the husband holds in his hands what he claims to be satisfactory proof of his wife's guilt, his delay to prosecute is strong evidence in the wife's favor. *Ib.*
12. To prove adultery by circumstantial evidence, two points are to be established; the opportunity for the crime, and the will to commit it. Where both are established, the court will infer the guilt. 123
13. Parol evidence, to raise an express trust upon the terms of a written instrument, is received with great caution, and must be very clear to warrant a court in establishing the trust. *Sayre v. Fredericks*, 205.
14. The mere proof of the loss or destruction of an instrument does not, as a matter of course, let in the party to give secondary evidence of its contents. He who voluntarily, without mistake or accident, destroys primary evidence, thereby deprives himself of the production and use of secondary evidence. *Wyckoff v. Wyckoff*, 401
15. If the destruction of an instrument was accidental, or if it occurred without the agency or assent of the party offering it, secondary evidence is admissible. But if it was voluntarily destroyed by the party, secondary evidence of its contents will not be admitted, until it be shown that it was done under a mistake, and until every inference of a fraudulent design is repelled. *Ib.*
16. Where the evidence in a cause fails to prove that a transfer of promissory notes was procured by fraud or false accusation, or by

any combination or conspiracy, it seems, nevertheless, that the transfer may be held invalid on the ground of surprise, coupled with evidence of mental weakness.
Hoagland v. Titus. 44

17. On this ground under the circumstances a re-hearing was ordered. *Ib.*

See PLEADING, 25.
PRACTICE, 57 to 59, 64, 72.
SALE OF LAND, 4.

EXCEPTIONS.

See EXECUTORS AND ADMINISTRATORS, 12.
PRACTICE, 21, 54.

EXECUTION.

See PARTNERSHIP, 5.
PRACTICE, 16, 17.
SHERIFF'S SALE, 1.

EXECUTORS AND ADMINISTRATORS.

1. Where the executors of an executor have received and inventoried as part of the estate of their testator, a trust fund held by him at his death in the character of *executor*, and not as trustee, and have settled their final account jointly, they are jointly chargeable as *executors*, with the balance thus found to be in their hands. *Schenck v. Schenck's ex'rs.* 174
2. The rule appears to be, that if a part of the assets has been clearly set apart, and appropriated by the executor to answer a particular trust, he will be considered to hold the fund as trustee for the trust, and no longer as mere executor. This principle is applied to protect the interests of *cestui que trusts.* *Ib.*
3. But how far it will avail to protect the executor or his representatives—*Query.* *Ib.*
4. But where a fund is not treated by the executor as a trust fund, nor invested according to the provisions of the will creating it, but is used by him as his own property,

or invested in the name of the executors of his testator, the estate of such executor is liable therefor, and passes into the hands of his executors charged with the payment of the trust fund. As executors, they are bound to account. *Ib.*

5. The probate of the will is conclusive evidence of the executor's acceptance of the trust. It is not discretionary with the executor, whether he will or will not act as trustee. By accepting the office of executor, he becomes *ex-officio* trustee in the stead of his testator, charged with all the duties and responsibilities of the office, and he will be decreed in equity to perform the trust. *Ib.*

6. An executor has an undoubted legal right to leave the active administration of the estate to his co-trustee, but neither by his tacit assent to the acts of his co-trustee, nor by the actual transfer of the legal title to the property, can he acquit himself of his responsibility. *Ib.*

7. The retention by an administrator of the fund in his hands, mingled with his own funds and used for his own profit, will entitle the party beneficially interested in the fund to a discovery and an account, and to such decree as may be necessary to maintain and enforce the complainant's rights. *Frey v. Demarest.* 236

8. The Orphans Court has no authority to try disputed claims, except in the case of insolvent estates. In such case, either the executor or administrator, or any person interested, may file exceptions against the claim of any creditor, and the court are to hear the proofs, and decree and determine in regard to the validity of the claims. It is a settled principle, that the Orphans Court is not the proper tribunal for the trial of disputed claims. But by a disputed claim here, is meant a claim which is disputed by the executor or administrator, not a claim which the legatee or next of kin may deem unfounded or unjust. *Vreeland v. Vreeland's adm'r,* 513

9. If the executor or administrator

disputes a claim, or refuses to pay it, the Orphans Court cannot allow it, or compel the executor or administrator to include it in his account. To justify the Orphans Court in allowing a claim against an estate, it must appear that the executor or administrator assented to, or recognized it as a debt due from the estate. But if the executor or administrator admit the claim, and pray allowance for it in his account, it is not a disputed claim within the meaning of the rule, and falls properly within the jurisdiction of the Orphans Court.

Ib.

10. Claims against the estate, paid by the executor or administrator, constitute properly a part of his account. If a claim paid by an executor or administrator, is illegal and unfounded, the charge in the account is open to exception, and the question thus brought within the jurisdiction of the Orphans Court.

Ib.

11. The mere fact that a debt or legacy has not been actually paid, constitutes no objection to its allowance upon the settlement of the account, if its existence is clearly established. By the settlement, the executor or administrator becomes liable for the amount thus allowed.

Ib.

12. If an administrator, by collusion with the claimant, claims allowance for a debt not paid, in order to withdraw the cognizance of the question from the ordinary tribunals of law or equity, it is a good ground of exception before the Orphans Court, and the item may be stricken from the account.

Ib.

13. An administrator is accountable for all property of the deceased, which came to his hands to be administered. He cannot be relieved from the accountability on the ground of loss, where the loss was occasioned by any default of his own.

514

14. Loans made on private or personal security, are at the risk of the trustees, who are personally answerable if the security prove defective. To afford complete indemnity to the trustee against the hazard of responsibility for loss,

the investment must be made in government stocks, or upon adequate real security.

Ib.

15. An executor or administrator can not sell, and part with the possession of assets which have come to his hands to be administered, without requiring security for the price. If he sell under judicial sanction, he must pursue strictly the order of the court. If he sell upon credit, without judicial sanction and upon his own discretion, he must use due caution in obtaining adequate security. If he do otherwise, he acts at his peril; and if a loss is sustained by the insolvency of the purchaser, he is guilty of a *deceit*.

Ib.

See JURISDICTION, 4.

LEGACY, 23, 26.

PRACTICE, 74, 75, 77, 79, 80, 82.

TRUST AND TRUSTEE, 6.

WILL, 6, 8, 10.

FRAUD.

1. The eleventh section of the "act for the prevention of frauds and perjuries," *N.Y. Dig.* 330, requiring trusts to be in writing, in terms, applies only to trusts of *lands*. It does not extend to trusts of *personalty*. *Sayre v. Fredericks*, 205

2. A mortgage of land is a mere security for the payment of the debt, and is not a conveyance within the statute of frauds, so as not to be assignable without writing.

Ib.

3. A mortgage given to secure a debt to other persons than the mortgagee, operates as a resulting trust, by implication of law, in their favor, which is expressly excepted from the operation of the statute.

Ib.

4. Whether a conveyance be fraudulent or not, depends upon its being made upon good consideration and *bona fide*. If it be defective in either particular, although valid between the parties and their representatives, it is void as to creditors.

Ib.

5. The distinction between *existing* and *subsequent* debts, in reference to voluntary conveyances, is, that as to the former, fraud is an infer-

ence of law; as to the latter, there must be proof of fraud in fact.
Belford v. Crane, 265

6. An undue concealment of a fact to the prejudice of another, which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent, constitutes a fraud against which equity will relieve. *Nicholson v. Janeway,* 285

See HUSBAND AND WIFE, 1, 2, 5, 7.
 MARRIED WOMEN, 10.
 MISTAKE, 2.
 PLEADING, 12, 13, 28 to 31.
 PRACTICE, 15, 18.
 PURCHASER, 1, 2.
 SHERIFF'S SALE, 10, 15.

GRANT.

See CHARTER, 3.
 CORPORATIONS, 13.

GUARDIAN AND WARD.

1. In an attempted settlement by a guardian of his account, either under the act respecting the Orphans Court, *N.Y. Dig.* 575, or under the act relative to guardians, *N.Y. Dig.* 341, there must be a compliance with the requirements of the statute, to render the account exhibited by the guardian *prima facie* evidence of its correctness, and to impose upon the ward the burden of proving, or showing the falsity or injustice of any item of the account, to which he may afterwards take exceptions. *Burnham v. Dalling,* 144
2. The design of the act of 1856, (*N.Y. Dig.* 590, § 3.) supplementary to the Orphans Court act, was, that notice should be given to the ward, of an intended settlement by his guardian. No notice to, or appearance by the guardian, can be a waiver of the notice prescribed by the act. *Culver v. Brown,* 533
3. Fifteen per cent. commissions having been allowed by the Orphans Court, the law authorizing but seven per cent., the decree must be corrected. *Ib.*
- HEARING.
- See* PLEADING, 4, 19.
 PRACTICE, 33.
- HUSBAND AND WIFE.
1. Where a wife takes the title to land, purchased with the property of the husband, under circumstances which render the transaction fraudulent as against the husband's creditors, she will be treated as a trustee for the creditors, and the property will be sold for their benefit. *Belford v. Crane,* 265
2. The existence of fraud is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted. A voluntary settlement on the wife by a husband while engaged in business, and involved in debt, is fraudulent as against creditors, no matter how pure the motive which induced it. *Ib.*
3. The right of the husband to the services of his wife, and to the avails of her skill and industry, is absolute. The wife can acquire no separate property in her earnings, though she carry on business in her own name, except by gift from her husband. *Ib.*
4. A settlement by the husband upon the wife, in consideration of meritorious services, is a pure gift or voluntary settlement, and though good as against the husband, can only be sustained against his creditors by virtue of an antenuptial contract. *Ib.*
5. If a party is indebted at the time of a voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. *Ib.*
6. The land having been purchased with the money of the husband, there is a resulting trust in his favor. The wife will be declared a trustee for the husband, for the benefit of his creditors. 266
7. A trust deed by the husband for the benefit of the wife, purporting to be given to secure certain funds received from the wife, but where no

- such funds were actually received by the husband, is fraudulent and void as against creditors. *Robert v. Hedges*, 300
8. The act of 1852, "for the better securing the property of married women," *N.Y. Dig.* 503, confers upon the wife no power of aliening or disposing of her separate property; she can only do so by the consent, and with the concurrence of her husband. She has the right of ownership, without the power of disposition. *Vreeland v. Vreeland's adm'r*, 512
9. The right of the husband to the wife's choses in action, as well as to her other property, real and personal, was extinguished by the act of 1852. *Ib.*
10. A bond given to the wife in her own name, and accepted by her in lieu of specific real and personal property to which she was entitled by inheritance, remains absolutely hers, as if she were a single female, and is not subject to the disposal of her husband. *Ib.*
11. The payment of such bond at its maturity to the husband, its subsequent investment by him in his own name, without objection by the wife, and his receipt of the interest, is no evidence (since the act of 1852) of the transfer of the property from the wife to the husband, or of the determination of her interest. *Ib.*
12. The reduction of a *chose in action* (the separate property of the wife) into possession, by the husband, without the consent of the wife, does not change the title of the property. The husband is accountable for so much of the estate of the wife, secured to her separate use, as has come into his hands. *Ib.*
13. Irrespective of the rights of the wife under the act of 1852, it is not every reduction by the husband, of the wife's choses in action into possession, that will vest the property absolutely in the husband. The ownership follows the will of the husband. But under that act, the husband has no right to convert the wife's choses in action to his own use. Such conversion is a violation of the rights of the wife. *Ib.*
14. The wife's assent to the reduction by the husband, of her choses in action into possession, for the mere purpose of re-investment, is no evidence of her assent to its conversion to the use of the husband. *Ib.*
15. If the wife's separate property consist of land, and she lives upon it, the husband may enjoy it jointly with her; if of chattels in possession, the husband may use them. *Ib.*
16. Though the wife may hold property in her own name, under the act of 1852, as if she were a *feme sole*, she can make no valid contract in regard to it, nor can she enforce its collection, without the intervention of her husband. *Ib.*
17. The fact that while a husband and wife are living together, he should be permitted to take the interest or profits of her separate estate for their mutual benefit, or for his own use, should, as between the husband and wife, raise no presumption prejudicial to her rights. 513
18. The second section of the act of 1852 does not relate *only* to the property in existence when the law went into operation: it applies equally to *after acquired* property. *Ib.*
19. The bond having been collected by the husband, and the money invested in his own name, the widow cannot claim the protection of the act of 1851. *N.Y. Dig.* 282, § 35. That act extends only to the specific chattel or chose in action. *Ib.*

See Practice, 14.

INJUNCTION.

1. The Court of Chancery has no power, by injunction, to restrain any citizen from petitioning either branch of the legislature upon any subject of legislation in which he is interested. Such restraint would be an unauthorized abridgment of the political rights of the party enjoined. *Story v. Jersey City and Bergen Point Plank Road Co.*, 13
2. The restraining power of a court of equity is exercised for the protection of rights, the existence of which is clearly established, and so far only as may be essential for

- the protection of those rights. *Del. and Rar. Canal Co. v. Rar. and Del. Bay Co.*, 321
3. An injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal title is not put in doubt. 322
4. The powers of a court of equity in regard to nuisances, are corrective as well as preventive. It may order them to be abated, as well as restrain them from being constructed. As a general rule, such relief will not be granted unless made the subject of a special prayer. 323
5. To justify the issuing of an injunction to restrain the erection of a nuisance, or to abate it after it is erected, it must appear not only that the complainant's rights are clear, but that the thing sought to be enjoined is prejudicial to those rights. The fact of the nuisance must be clearly established. *Ib.*
6. A structure, though illegal, will not be enjoined as a nuisance, where it occasions no injury to the rights of the complainant. *Ib.*
7. The closing of a road used as a highway for travel, by injunction, can only be justified by the clearest necessity. *Ib.*
8. To entitle a party to an injunction, his title to the property and rights claimed by him, and for the protection of which he asks the interposition of the court, must appear in a clear and satisfactory manner. *Morris Canal and Banking Co. v. Central Railroad Co.*, 419
9. This court will not interpose by injunction to prevent an apprehended injury, which is not irreparable, and which is capable of compensation in damages. 420
10. An injunction should only be issued in cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, and the injury be impending or threatened, so as to be averted only by the protecting, preventive process of injunction. *Ib.*
11. An injunction will not be continued for the mere purpose of restraining a naked trespass, or for the purpose of quieting the possession of a complainant who shows no title to the premises in dispute. *McGee v. Smith*, 463

See CORPORATIONS, 2, 8.

PLEADING, 36.

PRACTICE, 12, 21, 54.

• SPEC. PERF., 10.

INSOLVENT CORPORATION.

1. The only criterion of insolvency, furnished by "the act to prevent frauds by incorporated companies" (in regard to companies other than banking), is the *suspension of business*. *Bedford v. Newark Machine Company*, 117
2. The act of insolvency contemplated by the statute, is committed at the time the company suspends its ordinary business operations. *Ib.*
3. Under the 42d section of "the act to authorize the establishment, and to prescribe the duties of companies for manufacturing and other purposes," all laborers in the employ of the company at the time of the *suspension of its business operations*, and not those only in their employ at the time of instituting legal proceedings against them as an insolvent corporation, are entitled to priority in payment over the other creditors of the company. *Ib.*
4. The apprentices of such company are entitled to their wages without regard to the time that they were last actually laboring for the company. Their legal rights cannot be affected by the refusal or inability of the company to furnish them with employment. *Ib.*
5. A judgment confessed by a party on the eve of insolvency, without any view or expectation of obtaining aid to enable him to continue his business, affords strong evidence that it was done in contemplation of insolvency, and with the view of preferring creditors. *Stratton v. Allen*, 229
6. In the distribution of the funds of an insolvent company, a judgment confessed in contemplation of insolvency, and with the view of preferring creditors, is entitled to

- no priority. The debt will be paid proportionably with the other debts of the company. *Ib.*
7. A creditor of an insolvent corporation, who shows a reasonable excuse for not presenting his claim within the time limited by the order of the court in proceedings under "the act to prevent frauds by incorporated companies," *N.J. Dig.* 371, will be admitted at any time before actual distribution, or even after partial payments, if there be a surplus in the hands of the receivers, so as not to interfere with payments already made. *Grinnell v. Merchants Insurance Co.* 283
8. A creditor does not by such presentation, obtain a *vested right* to a certain dividend to the exclusion of others. *Ib.*
9. The fact that the petitioner was an officer of the corporation, and that the proceedings to establish its insolvency were instituted in his name, cannot prejudice his right to be let in to prove his claim before the receivers. *Ib.*
10. Ten days allowed to present claim. *Ib.*

INSOLVENT DEBTOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS AND FRAUDULENT TRUSTS.

INTEREST.

*See LEGACY, 16 to 18.
USURY.*

INTERPLEADER.

See SALE OF LAND, 7.

JUDGMENT.

1. Objections relating to the *regularity* of a judgment at law, or to the validity of the *instrument* upon which it is founded, constitute no ground for the interference of equity. *Stratton v. Allen.* 229
2. If the instrument upon which the judgment was entered, was with-

out consideration or invalid, or if the judgment was unauthorized or illegal, the remedy for a party aggrieved is by application to the court in which it was entered, or by writ of error. *Ib.*

3. A judgment can only be impeached in a court of equity for fraud in its concoction, and not for fraud in the instrument upon which it is founded. *Ib.*

*See INSOLVENT CORPORATIONS, 5, 6.
MECHANICS LIEN, 4.
PRACTICE, 16, 55, 56.*

JURISDICTION.

1. The proper office of courts of justice is to adjudicate upon, and to protect and enforce the legal and equitable rights of parties litigant, as they are established by existing laws. It is no part of their appropriate function to determine in advance, whether a proposed law may or may not be enacted consistently with the rights of parties, or to interfere directly or indirectly with the course of legislation. *Story v. Jersey City and Bergen Point Plank Road Co.* 13
2. The Court of Chancery is not deprived of its original jurisdiction in any case, either by the operation of a statute conferring similar jurisdiction upon the common law courts, or by the adoption in those courts of the principles or practice of courts of equity. *Frey v. Demarest,* 236
3. The court of equity has concurrent jurisdiction with the Prerogative Court over the administration of the assets of deceased persons. *Ib.*
4. Unless for some special cause, a court of equity will not interfere with the ordinary jurisdiction of the Orphans' Court in the settlement of the accounts of executors or administrators. Nor will it attempt to look behind such settlement, unless on the ground of fraud or mistake. *Ib.*
5. Where there is uncertainty as to the extent of the responsibility of a party from whom rent is sought to be recovered, a court of equity will maintain jurisdiction of a suit

for its recovery. *Swedesborough Church v. Shivers,* 453

LACHES.

*See PRACTICE, 34.
SHERIFF'S SALE, 3, 6.*

LEGACY.

Israel Woodward, by his will, gave and bequeathed as follows: "I give and bequeath to my daughter, Elizabeth Black, the sum of fourteen hundred dollars, which sum I order my executors to put out at interest, and take land security for the same, and pay her the yearly interest arising thereon during her natural life; and if she dies leaving no lawful issue, I order the said sum of fourteen hundred dollars to be divided between my sons and daughters equally." He died leaving seven children, beside the said legatee. Shortly after his death, six of the seven children signed the following instrument: "Whereas, our father, Israel Woodward, in his last will and testament, has bequeathed unto his daughter, Elizabeth W. Black, the interest of \$1400 during her natural life, but not to receive any part of the principal: Now be it remembered, that we, the subscribers, legatees of the said Israel Woodward, do hereby agree that the said sum of \$1400 shall be paid to her by the executors of said will, at the time of the decease of Edward Black, her present husband; but in case the said Elizabeth W. Black should depart this life before the said Edward Black, then this agreement to be void and of no effect." *Held*—

1. The gift over was valid. As applied to *personal estate*, such limitation over imports not an indefinite, but a *definite* failure of issue.
2. By the terms of the gift, Elizabeth Black took the entire interest of the testator, defeasible on her leaving no issue at her death.
3. The sons and daughters of the testator, living at his death, took a *residuary* interest in the residuary gift,

defeasible upon the death of the legatee for life, leaving issue.

4. The interest of the residuary legatees vested not in possession, but in *right*, upon the testator's death, so as to be transmissible to their personal representatives.
5. The limitation over is to all the sons and daughters of the testator, and the interest of either of such legatees is not defeated by his or her death before the legatee for life, but is transmitted to his personal representatives.
6. The defeasible interest of the legatees in the legacies over, upon the death of the legatee for life, was assignable.
7. The omission of one of the legatees to sign the agreement, will not invalidate it as against those who did sign it, they having derived all the benefit sought by the arrangement, and having incurred no additional burden or loss. *Woodward's adm'r v. Woodward & exrs,* 83
8. To constitute a specific legacy, the thing bequeathed must be *specified* and *distinguished* from the rest of the testator's estate. *Norris v. Thomson's ex'rs,* 218
9. The intention of the testator must be expressed in reference to the thing bequeathed, or it must otherwise clearly appear from the will. *Ib.*
10. To guard against an *ademption* or extinguishment of the legacy, contrary to the intention of the testator, the general leaning of the court is against making the legacy specific. *Ib.*
11. A bequest of government securities, or of shares in public companies, or of bonds of corporations outstanding and circulating as well known securities at the date of the will, is not a specific bequest, unless there is a clear reference to the *corpus* of the fund. *Ib.*
12. A legacy may be rendered specific by the use of the term "*my stock*, or the stock now "*in my possession*," or "*standing in my name*," or "*owned by me*," or by any other form of expression which clearly indicates the purpose of the testator to give the *specific thing*, and not to designate the *quantum*.

- ity or species of the thing bequeathed. *Ib.*
13. If, by the terms of the will, there be no such identification of the thing bequeathed, the legacy is general, and if not found in the possession of the testator at his death, is tantamount to a direction to the executors to purchase such securities for the legatee. *Ib.*
14. The mere possession by the testator, at the date of his will, of a larger amount of stocks or bonds than are bequeathed, will not make the bequest specific, when it is given generally of stocks, or of stocks in particular funds without further explanation. *219*
15. The nature of the legacy, whether general or specific, will be found always to depend upon the terms of the gift to the legatee, without reference to the circumstance, whether the estate was, or was not put in trust. *Ib.*
16. As a general rule, where the will is silent as to interest, a legacy bears interest only from the time it is made payable. But where a legacy to a child of the testator is made payable at a future day, and no maintenance in the meantime is provided for the legatee, the legacy bears interest from the death of the testator. *Jordan v. Clark,* *243*
17. Where the testator has expressly provided maintenance up to a certain period, leaving a chasm between that period and the time of the payment of the legacy unprovided for, interest will be allowed upon the legacy during such interval, by way of maintenance. *Ib.*
18. Where the devisee of land charged with the payment of legacies, has furnished the legatees with support, though not in strict conformity with the requirements of the will, and such support was furnished and accepted as a substitute for the provision directed by the will, and was in fact more advantageous to the legatees than the interest on the legacies would have been, the period, during which such support was furnished, will be deducted from the time during which interest is allowed on the legacy. *Ib.*
19. To constitute a legacy specific, it is necessary that such intention be either expressed by the testator in reference to the thing bequeathed, or otherwise clearly appear from the will. *Norris v. Thomson's ex'rs,* *542*
20. This is not a technical arbitrary rule, to be answered only by the use of particular words and expressions, but is an embodiment of the general principles by which the character of legacies should be tested and determined, each will resting for correct construction upon the language employed, and upon established surrounding significant circumstances, if such exist. *Ib.*
21. The language used by the testator in creating and directing the trusts in the will, has a clear reference to the stocks and particular bonds which the testator possessed when he executed the will, and shows that the testator intended that the legacies should be discharged by his trustees handing over to the respective legatees, stock and bonds which they would find in his strong box after his death. *Per OGDEZ, J.* *Ib.*
22. If the language of the will does not come up to the rule laid down in the books, the circumstances by which the testator was surrounded when the will was drawn, and the whole scope and texture of the instrument taken in connection with the particular clauses of bequest, clearly indicate an intention to create a specific legacy. *Ib.*
23. Where there is a general bequest for life with remainder over, the whole property must be sold and converted into money by the executor, the proceeds invested, and the interest only paid to the legatee for life. The rule prevails, except there is an indication on the part of the testator, that the legatee for life should receive the property bequeathed. *Howard v. Howard's ex'rs,* *486*
24. The circumstance that a bequest of general personal estate is in the same sentence with a devise of the real, will not make the legacy specific. *Ib.*
25. The well settled rule in equity is, that where it appears that there is danger that the principal of the

- legacy will be wasted or lost, the court will protect the interest of the legatee in remainder, by compelling the legatee for life to give security for the safe return of the principal. *Ib.*
26. Under like circumstances, the executor himself will be required to give security for the safety of the fund. *Ib.*

LEGATEE FOR LIFE.

See LEGACY, 23, 25.
PRACTICE, 42 to 46.
WILL, 5.

LEGATEE IN REMAINDER.

See LEGACY, 4 to 6.
PRACTICE, 42 to 45.
TRUST AND TRUSTEE, 4.

LOAN.

The forbearance or giving time for the payment of a debt, is in substance a loan. *Diercks v. Kennedy,* 210.

LUNATIC.

1. A lunatic can sue only by his committee or guardian, who is responsible for the conduct of the suit, or by the Attorney General or next friend, where the interests of the guardian clash with those of the lunatic. *Norcom v. Rogers,* 484
2. If a complainant appear upon the face of the bill to be a lunatic, and no next friend or committee is named in the bill, the objection may be raised by demurrer, or by motion to take the bill from the files. *Ib.*
3. A bill exhibited by a person of unsound mind should be taken from the files. 485
4. The bill in this cause having been filed by a lunatic, and the defendant having demurred, leave was given to withdraw the demurrer, and bill ordered to be taken from the files. *Ib.*

5. A commission of lunacy may issue where the alleged lunatic is an infant. *In re Chattin,* 496
6. The issuing of a commission of lunacy rests in discretion. *Ib.*
7. Where the alleged lunatic is in an asylum, the commission should be executed in the county where his mansion and estate are, or where he last resided before being sent to the asylum. *In re Child,* 498
8. It is not absolutely necessary that the alleged lunatic should be before the jury. A commission may issue where he is a non-resident, or temporarily absent from the state, and where it is impossible for the jury to see him. *Ib.*
9. If necessary, the court will order the party having the alleged lunatic in charge, to bring him before the jury. *Ib.*
10. Where the estate of the lunatic is small, the court will, it seems, in order to avoid inconvenience and expense, order the commission to issue to a different county from that in which he resides. *Ib.*

MARRIED WOMEN.

1. In the absence of any trust deed or settlement, defining and limiting the mode in which a separate estate shall be charged by the wife, equity will charge it, while she lives apart from her husband, with debts contracted by her for her own benefit, without any express appropriation by the wife, of the estate or any part of it, to the payment of the debt. *Johnson v. Cummins,* 97
2. The separate estate of a married woman is subject in equity to the payment of debts contracted in reference to, and upon the faith and credit of the estate. *Ib.*
3. Where a married woman lives apart from her husband, and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her *separate estate*, unless the contrary is shown. 98
4. It is no defence to a claim upon the separate estate of the wife, that the separate estate of the wife created by the statute (*Nix.*

- Dig.* 503, § 1,) is a *legal* estate, and that the enforcement of the claim in this aspect, is not properly within the cognizance of a court of equity. *Ib.*
5. The jurisdiction of a court of equity over the separate estate of a married woman rests not merely upon the ground that it is an equitable estate, but upon the ground that it is her *separate* estate, which is *equitably* subject to contracts and engagements entered into by her, which are not legally binding upon her personally, and which cannot be enforced at law. *Ib.*
6. Nor is it material whether the estate is vested in a trustee, the interest of the wife being merely equitable, or directly in her, so that she has both the legal and equitable interest. *Ib.*
7. The statute (act of 1852, for the better securing of the property of married women,) does not impair the right of the husband to an estate by *curtesy* in the separate property of the wife. *Ib.*
8. Nor, as it *seems*, does the act take away the husband's right to administer upon, and to take as his own, the personal property of the deceased wife, where she dies intestate. *Ib.*
9. A gift of money to a married woman in 1848, being made without a settlement upon her, as well as her earnings during the coverture, are the property of the husband. *Smith v. Vreeland,* 198
10. A voluntary conveyance to a married woman by her husband, while he is embarrassed by debts, is fraudulent and void as against creditors. *Ib.*
11. The act of 1852, for the better securing the property of married women, confers upon the wife a mere *jus tenendi*. It gives her no power to *dispose* of her property. *Belford v. Crane,* 265
- not a compliance with the statute (*Niz. Dig.* 524), and must be postponed to the claims of other encumbrancers. *Morris County Bank v. Rockaway Manufacturing Co.,* 150
2. Nor does it remedy the objection, that it appears by the evidence that the claim may be apportioned between the different buildings in proportion to the value of the materials used in the construction of each of them. *Ib.*
3. A claim, not filed according to the requirements of the statute, constitutes no encumbrance upon the premises. *Ib.*
4. A *judgment at law* entered upon the lien, the lien claim not having been filed pursuant to the statute, gives it no priority in payment, nor any advantage over liens upon which judgment has not been rendered. *Ib.*

MISTAKE.

1. Equity will relieve against a contract made under a mistake, or ignorance of a *material* fact; not only where there has been a concealment of facts by one party, but also in cases of mutual mistake or ignorance of facts. *Nicholson v. Janeaway,* 285
2. To constitute a fraud or mistake for which equity will relieve against a contract, it is essential that the fact misrepresented or concealed be *material*. It must either affect the substance of the contract, or the value of the thing bargained for; or besuch as induces the party aggrieved to pay more or accept less, for the thing bargained for, than its real value. *Ib.*
3. Equity will not grant relief against a contract on the ground of mistake, when the mistaken fact did not operate as an inducement to enter into the contract. *Ib.*
4. Where the difference between the actual and estimated quantity of acres of land sold in the gross, is so great as to warrant the conclusion that the parties would not have contracted had the truth been known, in such case the party injured is entitled to relief in equity

MECHANICS' LIEN.

1. A *lien* claim filed upon separate buildings and upon distinct lots of land, without apportioning the claim and designating specifically the amount claimed upon each, is

on the ground of gross mistake.
Weart v. Rose, 290

MORTGAGE.

By the act of 1854, *N.J. Dig.* 851, § 64, when the mortgagee resides in a different township from that in which the mortgaged premises lie, the tax on the money secured by the mortgage is to be assessed against and paid by the mortgagor in the township where the lands lie, and the receipt of the collector therefor is made a legal payment for so much of the interest of the mortgage, and is to be allowed and deducted therefrom by the mortgagee. *Held—*

1. The payment of the tax and the receipt of the collector is a legal payment of so much *interest*, not of principal; a payment of the *accrued* and *accruing* interest, not of interest to grow due at some future time.
2. When a mortgagor, entitled to have the tax assessed against and paid by him deducted from the interest, has paid the interest in full as it became due, without deducting the tax, he cannot afterwards claim any deduction therefor from the arrears of interest. *Keeney v. A'twood,* 35
3. A deed of assignment endorsed upon a mortgage, though duly executed and acknowledged, passes no interest to the assignee, where the contract under which the assignment was executed, was never consummated, and the mortgage never delivered to the assignee. *Rose v. Kimball,* 185
4. A party taking by assignment from the first assignee, with constructive notice of prior equities, will stand in no better position than his assignor. *Ib.*
5. At common law personal estate is the primary fund for the payment of debts, and the heir-at-law may call upon the executor to exonerate the land by discharging the mortgage debt out of the personal estate. The devisee stands in the same position as the heir, and is entitled to the same equity. *Keene v. Mann,* 398
6. But the mortgagee, or alienee, of the heir or devisee, has no such equity. The principle is adopted in favor of the heir or devisee alone, and not in favor of his alienee. *Ib.*
7. Where a mortgagor has from time to time aliened certain portions of the mortgaged premises, that portion not aliened will be first sold to satisfy a decree of foreclosure and sale; if such sale do not bring sufficient to satisfy the decree, then the parcel last aliened will be sold, and so on in the reverse order of the conveyances, until the decree is satisfied. *Ib.*
8. A agreed to convey to B a tract of land for \$500. B applied to C for a loan of that amount. C agreed to loan B \$550 upon his giving a mortgage upon the said tract for \$850, with interest at seven per cent. Upon agreement between the parties, A executed a deed to B for the land for the nominal consideration of \$850; B giving A a bond and mortgage for that amount. A assigned the mortgage to C in pursuance of the agreement for \$550; \$50 in cash to be paid to B. Of this amount nothing was actually paid to B. Upon a bill to foreclose, filed by C to recover the nominal consideration of \$850. *Held—*
9. The transaction, though in form a sale and mortgage for \$850, in reality was a sale and mortgage for \$500.
10. The complainants are entitled to the \$500, actually advanced by them to the mortgagee. The contract by which they claim \$350 beyond that amount was usurious, and cannot be enforced. Under such circumstances, the mortgage will be deemed a security for the amount actually advanced. *Walter v. Lind,* 445
11. If a mortgagee in possession, permits the mortgagor to take the profits of the mortgaged premises, the mortgagee will be charged, in

favor of subsequent encumbrancers, with all the profits he might have received. So if the mortgagee refuses to enter, but suffers the mortgagor to take the profits and to protect his possession by means of the mortgage. *Demarest v. Berry.*

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12. The principle upon which the court acts is, that if the mortgagee be in possession, or act *mala fide* in regard to subsequent encumbrancers, he will be charged not only with all profits received, but with all which, without fraud or wilful default, he might have received from the mortgaged premises. *Ib.*

13. Where the mortgagee is not in actual possession by himself or his tenant, and has received no part of the profits, nor used his mortgage to interfere with the claims of subsequent encumbrancers, or to protect the possession of the mortgagor, he is not chargeable with any part of the profits. *Ib.*

14. The general rule is, that where a part of the mortgaged premises has been aliened by the mortgagor and a part retained by him, the part retained, as between the mortgagor and his alienee, is primarily chargeable with the debt. *Weatherby v. Slack,*

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15. The real question in such cases must always be, who, in equity, is bound to pay the debt? The debt is due from the mortgagor to the encumbrancers, and his portion of the mortgaged premises must primarily bear the burden, unless it be shown that it has, by some means, been shifted upon the portion of the alienees. This fact it is incumbent upon the mortgagor to establish. *Ib.*

See PLEADING, 1, 2.
PRACTICE, 65, 66
TAXES, 11.
TRUST AND TRUSTEE, 3.
USURY, 1.

MULTIFARIOUSNESS.

& See PLEADING, 13, 14, 31, 36.

NE EXEAT.

The court will not grant a writ of *ne exeat* against the husband, or an injunction to restrain him from alienating his property, upon the mere apprehension of an abandonment. *Anshutz v. Anshutz,* 162

NOTICE.

See AGREEMENT, 11.
DEED, 4, 5, 6.
PRACTICE, 51.
PURCHASER, 1, 2, 4.

NUISANCE.

See INJUNCTION, 4, 5, 6.

ORPHANS COURT.

See EXECUTORS AND ADMINISTRATORS, 8, 9, 10, 12.
JURISDICTION, 4.
PRACTICE, 67, 83.

PARTIES.

See PLEADING, 1, 2, 3, 17, 18, 19, 28, 29, 30, 43.
PRACTICE, 33, 87.

PARTNERSHIP.

1. An undue concealment of a fact to the prejudice of another, which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent, constitutes a fraud against which equity will relieve. *Nicholson v. Janeway,* 285
2. In all transactions between partners, and all parties occupying towards each other a fiduciary character, the law requires the utmost degree of good faith. *Ib.*
3. If a partner who superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchases the share of another partner for an inadequate price, the purchase will be held void, and

- the purchaser compelled to account for the real value. *Ib.*
4. Nor does it affect the case that the alleged concealment is charged to have been practiced by one partner only, and that the others were ignorant of the fact concealed. The principle applies, whether the fraud was perpetrated by the party directly interested, or by *an agent*. The principal, by seeking to retain any benefit resulting from the transaction, becomes *particeps criminis*, however innocent of the fraud in its inception. *Ib.*
5. A joint execution upon a judgment for a partnership debt, may be executed not only against the partnership property, but against the separate estate of each partner, for each is answerable for the whole, and not merely for his proportionate part of the debt. *Randolph v. Daly*, 314
6. A court of equity will protect and enforce the legal right of an execution creditor at law to levy upon the separate property of each partner of a firm. *Ib.*

PLEADING.

1. Where a mortgage is given or assigned for the payment of a debt due to two or more jointly, on a bill to foreclose filed by the surviving obligee, the executor of a deceased co-obligee need not necessarily be joined as a complainant. *Freemen v. Scofield*, 28
2. Where there are conflicting claims between the parties in interest in the mortgage debt, the surviving obligee may file the bill in his own name, and make the executor of the deceased co-obligee a defendant. *Ib.*
3. Whether the executor of a deceased co-obligee should be joined with the surviving obligee as complainant, or be made a party defendant to the suit, is a question of *form*, and should be raised upon *demurrer*. *Ib.*
4. Objections to pleadings which involve no substantial interest, are not allowed upon the final hearing. *Ib.*
5. Where the answer alleges generally, that the contract upon which the suit is brought is usurious, without any more specific allegation, it must be intended that the defence is that the contract is in violation of the statutes of this state, and to that objection alone the defence must be limited. *Attwater v. Walker*, 42
6. The inquiry when the cause is heard upon a plea, is substantially as if the complainant had *demurred* to the plea. *Davison's ex'res v. Johnson*, 112
7. If the complainant deems the plea bad, the case goes to hearing upon the plea; if good, but not true, he takes issue upon it and proceeds as in case of an answer. *Ib.*
8. The subject of the inquiry is not the mere technical form of the plea, but the sufficiency of its averments to sustain the defence; whether assuming all the facts properly set out in the plea to be true, it presents a valid defence. *Ib.*
9. The pendency of a former suit being pleaded in bar, the defendant may state the pendency and object of the former suit, and aver that the present suit was brought for the same matters; or he may omit the averment that the suits are for the same subject matter, provided he state facts sufficient to show that they are so. *Ib.*
10. A complainant cannot compel a demurral upon the facts as stated in the bill, if they are imperfectly or inadequately stated. The defendant must be at liberty to plead the facts upon which he relies for his defence, in such form and with such detail as to raise the real question which he desires to present. *Ib.*
11. An award constitutes no valid defence to an action, unless it clearly appear that the subject matter of the suit was within the award. 113
12. A denial by the answer of the existence of fraud, will not avail to disprove it, where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable conclusion. *Sigre v. Fredericks*, 205
13. A bill filed to obtain satisfaction

- of a judgment at law is not demurable on the ground of multifariousness, because it seeks to remove fraudulent conveyances and encumbrances, and also to bring within the reach of the judgment, equitable interests which are not the subjects of execution at law. *Way v. Brayaw.* 213
14. Where the case made by the bill is so entire, that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case as stated, neither of the defendants can demur for multifariousness or for a misjoinder of causes of action, in some of which he has no interest. *Ib.*
15. Where a judgment creditor files a bill in equity to obtain aid in enforcing the payment of his judgment at law, it is no ground of demur that other creditors, not in equal degree, are not made parties to the bill. *Ib.*
16. A plea of another suit depending for the same cause in bar of a suit in equity, can only be of a suit depending in the same, or in some other court of equity. 214
17. *Cestui que trusts* are not, it seems, necessary parties to suits against trustees, to compel the specific performance of contracts, except where some question arises touching the power of the trustee to execute the contract, or their authority to act under it. *Vandoren v. Robinson.* 256
18. But where a bill in equity involves the title of the *cestui que trusts* to the property in dispute, or where they are interested, not only in the fund or estate respecting which the question at issue has arisen, but also in that question itself, they are necessary parties. *Ib.*
19. An objection for want of proper parties taken at the hearing will not prevail, unless such parties are necessary to the final determination of the cause. *Ib.*
20. Where the cause is heard upon bill and answer, the answer must be taken as conclusive proof of the facts which it sets up by way of defence. But intentions and motives are not facts, touching which the answer is conclusive. *Belford v. Crane.* 265
21. A defendant cannot pray anything in his answer but to be dismissed the court. If he has any relief to pray, or discovery to seek against the complainant, he must do so by cross-bill. *Miller v. Grayory.* 274
22. An answer to a bill to foreclose cannot draw in question the fairness and validity of a sale, the purchase money whereof the mortgage was given to secure, or impeach the contract on which the title of the mortgagor is founded. These matters can only be drawn in question by cross-bill. *Ib.*
23. An answer to a bill for divorce on the ground of desertion, which sets up as a defence a general and vague charge of cruelty on the part of the husband, without specifying any act of cruelty, or making any statement from which it can be discovered in what the cruelty consisted, is radically defective. *Moores v. Moores.* 275
24. The defendant is bound to state in his answer all the circumstances of which he intends to avail himself by way of defence, and to apprise the complainant in a clear and unambiguous manner, of the nature of the case he intends to set up. *Ib.*
25. Evidence must be confined to the issue made by the pleadings, and all evidence in support of totally distinct facts from those relied upon in the bill or answer, is irrelevant, impertinent, and inadmissible. *Ib.*
26. Under general allegations particular instances may be proved, but in such cases the general charge must be of such precise and definite character, as to apprise the adverse party of the nature of the evidence to be introduced. *Ib.*
27. A court of equity will not deprive a defendant of his defence upon a mere technicality of pleading, when its admission affects prejudicially no right of the complainant. *Ib.*
28. Where the sole design of the bill is to have the individual property of one partner, alleged to have been fraudulently conveyed away

- by him, applied in satisfaction of a judgment against the firm, another partner from whom no discovery is sought, and against whom no relief is prayed, is neither a necessary nor a proper party. *Randolph v. Daly,* 313
29. A wife is a proper party to a bill filed to set aside conveyances of the husband's property made to her, or in which she has joined, and which are charged to have been voluntary and fraudulent as against creditors of the husband. *Ib.*
30. It is no cause of demurrer to a bill to set aside fraudulent conveyances made by a debtor, that a defendant, to whom part of the property has been conveyed, has no connection with other fraudulent transactions of the debtor. If the defendant is a necessary party to some part of the case as stated, he cannot object that he has no interest in other transactions constituting a part of the entire case. *Ib.*
31. A bill filed by an execution creditor is not demurrable for multifariousness because it seeks to set aside fraudulent conveyances, and at the same time to reach other property of the debtor, which is not the subject of execution at law, and respecting which a discovery is prayed. 314
32. The transactions charged, being parts of a series of acts all tending to defeat the plaintiff's remedy at law, may properly be united in the same bill. *Ib.*
33. Certainty to a common intent is all that is ordinarily required in pleadings in equity. *Ib.*
34. To entitle an execution creditor to relief, it must appear by the bill that he has exhausted his remedy at law, and that the aid of this court is necessary to enable him to obtain satisfaction of his judgment. *Ib.*
35. Where the cause is heard upon bill and answer, the allegations of the answer are to be taken as true. *Rced's ex'rs v. Reed,* 248
36. A bill asking an injunction to restrain waste, and also an account for rent due, is demurrable on the ground of multifariousness. *Ib.*
37. A general allegation in a bill for divorce, that the defendant within a specified time has committed adultery, is insufficient. The party with whom the crime is believed to have been committed, must be named; or if unknown, an averment to that effect is necessary. *Marsh v. Marsh,* 391
38. The charge must be so full and specific that the party charged may know what he is called on to answer. It should state the time when, the place where, and if known, the person with whom the offence was committed. It is not necessary to state the day, but the month and year should be stated. *Ib.*
39. An averment that the statements contained in the bill are made upon information and belief, constitutes no ground of demurrer. *Ib.*
40. A bill praying a discovery from the defendant, whether since her marriage she has not committed adultery with any person whatever, and with whom, and at what time and place, and under what circumstances, is demurrable. The rule is, that the defendant is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to an accusation of that nature. And the objection lies to a particular interrogatory, though the bill be in other respects unexceptionable. *Ib.*
41. Under a general demurrer for want of equity, no objection for want of form can properly be raised. A demurrer must express the several causes of demurrer. 392
42. Demurrer overruled, with leave to amend by stating the grounds of demurrer within twenty days, unless the complainant within that time shall amend his bill in the particulars objected to. *Ib.*
43. A bill is not demurrable for want of proper parties, when all the persons whose rights are to be affected by the decree are joined. *Swedesborough Church v. Shivers,* 453

POWER.

See DEED, 3.

PRACTICE.

1. It is no defence to a suit brought by a wife after the death of her husband, to foreclose a mortgage made to her *jointly* with her husband for the benefit of the wife, that the bond was given to the husband *alone*, and to his heirs. She is the surviving mortgagor, and has a clear right to enforce her remedy under the mortgage. *Burlew v. Hillman.* 23
2. A party *beneficially* interested in a contract may maintain a suit in equity in his own name to enforce such rights, though he be not a party to the instrument creating them. *Ib.*
3. Where there are several parties in interest, and the mortgagor is in doubt as to the rights of the complainant under a bill to foreclose, he is entitled to have the question judicially determined for his own security, but not at the cost of the mortgagee. *Ib.*
4. The general rule is that the mortgagee is entitled to costs, both on bills to redeem and to foreclose. *Ib.*
5. The rule, irrespective of the statute, is that where a sole plaintiff or defendant dies before decree, the suit cannot be revived at the instance of the defendant, or of his legal representative. *Benson v. Wolverton.* 110
6. The statute has not altered the practice, except by providing a more expeditious mode of proceeding by *order*, instead of resorting to a bill of revivor. *Ib.*
7. No costs are given, either under the statute, or by practice irrespective of the statute, if the complainant, or his representative, elect not to proceed. *Ib.*
8. Where a sole plaintiff or defendant dies after the final argument, but before decree, the court may order the decree to be signed as of a date prior to the death of the party. *Ib.*
9. Where a sole plaintiff or defendant dies *after* decree, either party may revive the suit. *Ib.*
10. The judgment or decree of a court of general jurisdiction, upon a subject matter within its jurisdiction, is final and conclusive, and can never be questioned in a collateral suit. *Young's ad'mr v. Rathbone.* 224
11. But where the order or decree is not an error of judgment, but an usurpation of power, it is not conclusive, and may be drawn in question in a collateral proceeding. 225
12. The court will not grant a writ of *ne exeat* against the husband, or an injunction to restrain him from alienating his property, upon the *mere apprehension* of an abandonment. *Anshutz v. Anshutz,* 162
13. A bill will not lie for divorce on the ground of desertion, where the parties are living apart under articles of separation, or by mutual agreement, and where the party seeking it has not expressed a desire to terminate the agreement. *Moores v. Moores.* 276
14. A voluntary agreement between husband and wife to live separate, constitutes no bar to an action, by either of the parties, for a restitution of marital rights. Nor does it operate in the eye of the law, as a release of either of the parties from their matrimonial obligations. *Ib.*
15. A court of equity has the power to aid a judgment creditor to reach the property of his debtor, either by removing fraudulent judgments or conveyances which obstruct the plaintiff's remedy under the judgment, or by appropriating in satisfaction thereof, rights or equitable interests of the defendant, which are not the subject of legal execution. *Robert v. Hodges.* 299
16. If a creditor seeks the aid of this court against the *real estate* of his debtor, he must show a *judgment at law* creating a lien on such estate; if he seeks aid in regard to the *personal estate*, he must show an *execution* giving him a legal preference or lien on the goods and chattels. *Ib.*
17. To reach an *equitable* interest of the debtor, the creditor must first have taken out execution at law, and have required it to be levied or returned, so as to show a failure of his remedy at law. Equity will only grant its aid to enforce legal process, when it appears that the

- legal remedy of the complainant is exhausted. *Ib.*
18. A creditor *at large*, or before judgment having no specific lien on his debtor's property, is not entitled to the interference of equity, by injunction, to prevent the debtor from disposing of his property in fraud of his creditor. *Ib.*
19. An *attaching* creditor, having a lien upon the property of his debtor by authority of the statute, prior to the recovery of judgment, is entitled to the aid of a court of equity to enforce his legal right. *300*
20. If the court, where judgment is recovered, have jurisdiction of the person of the defendant, and of the subject matter of the suit, its conclusiveness cannot be questioned in the forum of another state where it is sought to be enforced. *Ib.*
21. The filing of exceptions to an answer, constitutes no technical objection to the dissolution of an injunction. The court will look into them merely to ascertain whether they relate to the points of the bill upon which the injunction rests. *Ib.*
22. It is within the power of a court of equity to consolidate actions, with or without the consent of the complainants. *Burnham v. Dalling.* *310*
23. The order for consolidation is not of right, but is matter of discretion, and upon such terms as the court may direct. *Ib.*
24. Where a guardian has failed to account as required by law, and sets up a prior account as a bar to accounting in this court, and a decree for an account is made, the complainant will be allowed costs up to the decree. *Ib.*
25. A party in interest having died since the argument, and before the signing of the decree, the decree and orders in the cause should be signed and filed as of the date of the argument. *Ib.*
26. An order for that purpose is necessary. *Ib.*
27. The return of the sheriff that the defendants are not, either in their partnership name or as individuals, seized or possessed of any estate, real or personal, which could be seized or taken by virtue of the execution, must be taken as *prima facie* evidence of the fact, and is sufficient to give the complainants a standing in this court. *Randolph v. Daly.* *314*
28. Upon a bill filed to recover the interest of a legacy only, a decree cannot be made for the payment of the principal which has fallen due since the filing of the bill. *Jordan v. Clark.* *243*
29. Such decree is not within the special prayer for relief, and could not have been prayed for at the time of filing the bill. If relief is asked to which the complainant is not entitled, the bill is demurrable. *Ib.*
30. Under the general prayer for relief, the relief granted must be agreeable to the case made by the bill, and such as the case stated will justify. *Ib.*
31. In a foreclosure suit if the mortgage is forfeited, and the complainant entitled to a decree of foreclosure at the time of the commencement of the suit, a decree for the whole amount due upon the mortgage, whether it becomes due before or after the filing of the bill, is strictly within the prayer for relief, and such as the case stated will justify. *Ib.*
32. When the title of *cestui que trusts* to the fund in question is involved, no decree will be made unless they are before the court. *Reed's execs v. Reed.* *248*
33. On final hearing, permission given to amend by consent, by adding necessary parties within ten days, and before signing the decree. *Ib.*
34. Gross laches and long delay on the part of the complainant in a simple foreclosure case, in commencing and prosecuting his suit, is unjust and oppressive to the defendant, and is a strong circumstance against the justice of the complainant's claim. *Shipman v. Cook.* *251*
35. A commission under which a party has been found an habitual drunkard, will not be superseded upon a hearing without notice, nor upon *ex parte* affidavits, even with the assent of the guardian. *In re Weis,* *318*
36. The practice in proceedings to supersede a commission, in cases of

- habitual drunkenness, should be substantially the same as in cases of lunacy. *Ib.*
37. The truth of the facts alleged in the petition may be examined either in open court or before a master. Proceeding by reference to a master adopted as the most convenient, safe, and expeditious course. *Ib.*
38. In an application for alimony *pendente lite*, the case must be taken most strongly against the petitioner. The burthen of proof is upon her. *Walling v. Walling*. 389
39. All the facts upon which an order for alimony is founded, must be proved. The order must not rest upon mere presumption or conjecture. *Ib.*
40. Where the circumstances upon which a proper adjustment of alimony materially depends, do not appear in the petition, a reference to a master will be ordered, to ascertain the real facts of the case. *Ib.*
41. Under the special circumstances of this case, the question was disposed of upon the facts stated in the petition, without a reference. 390
42. In the case of a specific bequest of chattels for life, and a limitation over by way of remainder, the legatee in remainder is no longer entitled, as formerly, to call upon the tenant for life for security that the chattels shall be forthcoming after his decease. The recognized practice of the court now is, to require an inventory to be signed by the devisee for life, and to be deposited with the master for the benefit of all parties. *Rowe's execs v. White*. 411
43. Personal property not given specifically but *generally*, or as a residue of personal estate, must be converted into money; the interest only to be enjoyed by the tenant for life, and the principal reserved for the remainderman. This rule prevails, unless there be in the will an indication of a contrary intention. *Ib.*
44. Where a legacy is given generally, subject to a limitation over upon a subsequent event, the divesting contingency will not prevent the legatee from receiving his legacy at the end of a year from the testator's death, and he is not bound to give security for repayment of the money in case the event should happen. *Ib.*
45. In the case of a legatee for life, or subject to a limitation over, in order to justify the requisition of security from the first legatee, there must be danger of the loss of the property in the hands of the first taker. *Ib.*
46. The mere fact that the legatee for life is a *feme covert*, cannot in itself furnish any evidence of danger of loss. *Ib.*
47. A bill for relief on the ground of danger of loss of a legacy for life, subject to a limitation over by way of remainder, is in the nature of a bill *quia timet*, and may be filed as well against the executor himself where the fund is in his hand, as against the legatee for life, where the fund is in his hand. *Ib.*
48. An objection to a suit that the amount involved is too trivial to justify the court in taking cognizance of it, may be taken advantage of by special motion to dismiss the bill, or the court may of its own motion at the hearing, order the bill to be dismissed. *Swedesborough Church v. Shivers*. 453
49. If a suit have no other object than the mere recovery of a sum of \$1.75, the bill will be dismissed; but if it seeks to establish a right of a permanent and valuable nature, it falls within the recognized exceptions to the general principle, and the court will maintain jurisdiction. *Ib.*
50. The issuing of a subpoena, except in cases to stay waste, before the filing of the bill, is irregular, and if promptly brought to the notice of the court, the subpoena, on motion for that purpose, will be set aside as illegally issued. *Crowell v. Botsford*. 458
51. Where a party seeks to set aside the proceedings of his adversary for an irregularity which is merely technical, he must make his application for that purpose at the first opportunity. If a solicitor, after notice of an irregularity, takes any step in the cause, or lies by and

- suffers his adversary to proceed therein under a belief that his proceedings are regular, the court will not interfere to correct the irregularity, if it is merely technical. *Ib.*
52. The statute (*Niz. Dig.* 97, § 6.) is merely directory of the mode of proceeding. The time or form in which the thing is directed to be done, is not essential. The proceedings in such cases are valid, though the command of the statute is disregarded or disobeyed. *Ib.*
53. The issue of the subpoena before bill filed, is a purely technical irregularity, and is waived by an appearance. 459
54. The filing of exceptions to the answer constitutes no objection to the dissolution of an injunction, if the equity of the bill upon which the injunction rests has been fully answered. *McGee v. Smith,* 463
55. A party who comes into a court of equity for relief against a judgment or other security, on the ground of usury, will only be relieved upon paying what is really due upon such security. *Giveans v. McMurtry,* 468
56. Where a party, as security for money loaned, has taken an assignment of a pre-existing judgment against the borrower, and, as a further security for the same debt, has also taken a bond and mortgage; a decree of this court declaring the bond and mortgage usurious and void, will not avail the debtor in a bill for relief to have the judgment declared satisfied of record, the assignment being untainted with usury. *Ib.*
57. The evidence of a co-defendant is not rendered incompetent by the fact that no order was made for his examination. Since the act of 1859, (*Niz. Dig.* 928, § 34.) removing the disqualification of interest in a witness, as a party or otherwise, no order for his examination is necessary. *Ib.*
58. Nor is it any objection to the competency of a co-defendant to testify, that he has not answered the bill, but has suffered a decree *pro confesso* against him. The complainant may, at his discretion, require him to answer. But if he do not, the defendant, by failing to answer, cannot deprive his co-defendant of his testimony, or disqualify himself as a witness in the cause. *Ib.*
59. Upon a bill for an account, the only material evidence upon the original hearing, is that which conduces to prove the complainant's right to an account. The ordinary decree is that an account shall be taken. Evidence as to the particular items of the account is irrelevant, and, in strictness, inadmissible at this stage of the cause. *Hudson v. Trenton Locomotive and Machine Manufacturing Co.*, 475
60. As a general rule, the court will not, at the original hearing, examine or decide whether particular items of the account shall or shall not be allowed. 476
61. The court must, it would seem, settle the construction and effect of agreements between the parties, by which their mutual dealings were regulated, and by which, consequently, the account must be controlled. *Ib.*
62. The court will give special directions to the master as to the manner of taking the account, and the principles by which he should be governed in taking it. *Ib.*
63. The decree must direct to what matters the account shall extend, and in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case. *Ib.*
64. Where the evidence has been taken on both sides before the hearing, without objection, it may be used by the court, so far as may be necessary, in giving directions. *Ib.*
65. A suit for foreclosure upon each of two mortgages covering the same premises, both of which were in the hands of the complainant when the first bill was filed, is unnecessary and oppressive, and costs will be allowed but in one suit. *Demarest v. Berry,* 481
66. But where the second bill was rendered necessary by the fact (discovered after the filing of the first) that the mortgage, upon which the first bill was filed, covered a part only of the premises included

- in the other mortgage, proceedings in the first suit will be stayed, and the second suit alone proceed to decree. *Ib.*
67. Where the notice requiring creditors to present their claims, has been given in pursuance of an order of the Orphans Court, under section 3d of the "act concerning the estates of persons who die insolvent," (*N.J. Dig.* 386,) the creditor cannot be admitted to a dividend of the estate, unless his claim has been presented *under oath*, within the time limited by the order. *Gould v. Tingley.* 501
68. Nor does it obviate the necessity of presenting the claim *under oath*, that the order and notice requiring claims to be exhibited, were made by the surrogate under section 22d. of the act of 1855. (*N.J. Dig.* 589.) *Ib.*
69. The act of 1855, on proceeding under a rule to bar creditors, having required the claim of the creditor to be made *under oath*, dispensed with the necessity of a second presentment of the same claim under proceedings to declare the estate insolvent. *Ib.*
70. The requirements of both acts are *imperative*, not directory merely. *Ib.*
71. The question involving the construction of a recent statute, the decree is made without costs against the appellant. *Ib.*
72. Evidence taken under an order of the Prerogative Court to be used upon the hearing of an appeal, is competent. *Sayre v. adm'r v. Sayre.* 505
73. It is no valid objection to a decree of distribution, that it is made in favor of parties who are not applicants therefor, and whose shares have been satisfied or released. 506
74. The decree of distribution is final and conclusive between the administrator and the distributees, as to the amount of each share, and the party entitled to receive it. It is an effectual protection to the administrator, against all claims for moneys paid pursuant thereto, though it should prove that the decree was erroneous, and the money paid to a party not entitled. *Ib.*
75. The remedy by a party deprived of his rights by the decree, is not against the administrator, but against the distributees who have wrongfully received the estate. In their favor, as against the rightful claimant, the decree does not operate. *Ib.*
76. It is no part of the office of a decree of distribution, to settle whether the share has been paid, in whole or in part, or whether the legal or equitable interest in the fund may have been assigned. Its office is simply declaratory of the rights of the legal representatives or next of kin in the estate of the intestate. *Ib.*
77. The question, whether an administrator has actually paid a claim under the order of distribution or not, can only be properly tried by suit. *Ib.*
78. But no action can be brought by the claimant, until the decree of distribution is made. The decree, it would seem, must of necessity be made, in order that the right may be properly tried and decided. *Ib.*
79. The decree upon the final settlement and allowance of administrator's accounts, is final and conclusive upon all parties interested. It ascertains and declares the net balance in the administrator's hands, and the sum for which he must account to the distributees. *Ib.*
80. The order for distribution may be made at the instance of the administrator, or of any one of the distributees. If made at the time of the settlement, no further notice is necessary. *Ib.*
81. A separate decree cannot be made at the instance of each of the claimants. *Ib.*
82. One decree only, can protect the administrator. *Ib.*
83. The design of the act of 1856, (*N.J. Dig.* 590, § 3.) supplementary to the Orphans Court act, was, that notice should be given to the ward, of an intended settlement by his guardian. No notice to, or appearance by the guardian, can be a waiver of the notice prescribed by the act. *Culver v. Brown,* 533
84. Fifteen per cent commissions having been allowed by the Orphans

- Court, the law authorizing but seven per cent., the decree must be corrected. *Ib.*
85. The well settled rule in equity is, that if the *lender* comes into court seeking to enforce a usurious contract, equity will repudiate the contract. But if the *borrower* seeks relief against the usurious contract, the only terms upon which the court will interfere, are that he shall pay what is really and *bona fide* due. *Hudnitt v. Nash*, 550
86. A bill for foreclosure by a second mortgagee, making the first mortgagee a defendant, as against such first mortgagee, is, in effect, a bill to redeem, not to foreclose. *Ib.*
87. The first mortgagee is not a necessary nor a proper party to a bill by a subsequent mortgagee, if the sole design of the suit is a foreclosure of the equity of redemption. Technically, all that can be asked in such case is, that the complainant be permitted to redeem the prior encumbrance. *Ib.*
88. Where, as in our practice, prior encumbrancers are permitted to be made parties to a bill for foreclosure and sale of mortgaged premises, if the first mortgagee, defendant in such bill, comes in with his mortgage, he simply assents to the relief prayed for by the complainant. *Ib.*
89. As against the first mortgagee, the relief prayed for will not be granted, unless by his consent, or upon payment of the amount actually due upon his mortgage. *Ib.*
90. Where, to a bill for foreclosure, the answer of the owners of the equity of redemption raises the defence of usury to the mortgage of a co-defendant, such answer is in the nature of a cross-bill, seeking relief against the usurious mortgage. *Ib.*
91. Upon a bill filed by a second mortgagee for foreclosure, and seeking to avoid the first mortgage as usurious, no decree will be made declaring the usurious mortgage a valid encumbrance for the amount actually advanced, unless by the consent, express or implied, of the owners of the equity of redemption, to the proceedings. 551
92. But if the parties interested in the equity of redemption, concur in the prayer of the bill by resisting the usurious mortgage, and the cause is brought to final hearing upon the pleadings and proofs, a decree pronouncing the mortgage usurious, and declaring it an encumbrance only for the amount actually advanced, will not be reversed at the instance of the owner of the equity of redemption. *Ib.*

PRAYER.

See PLEADING, 21.
PRACTICE, 29, 30, 31.

PREROGATIVE COURT.

See JURISDICTION, 3.
PRACTICE, 72.

PRINCIPAL AND AGENT.

1. Where a party negotiates with another's agent for the loan of a sum of money, and delivers to the agent a bond and mortgage duly executed to the principal, but the whole amount of money is not paid over to the mortgagor by the agent; in such case, if the principal settle with the administrator of his agent, and accepts the securities as evidence of so much money advanced by the agent, and allows the amount in the settlement of the account, the mortgagor is estopped, as against the principal, from denying that he received the money. *Kirkpatrick v. Winans*, 407
2. If the money were not paid over by the agent to the mortgagor, and he designed to look to the mortgagee, he should have given notice of such intention. By failing to do so, and permitting the settlement to be made, he is estopped from making any claim against the mortgagee. 408
3. The principal is not liable for the unauthorized or wrongful act of his agent in withholding a part of the money, or in giving his own notes payable at a future day, in

lieu of the money of the principal in his hands. The remedy is against the agent only. *Ib.*

See PARTNERSHIP, 4.
USURY, 3.

PURCHASER.

1. Equity will protect the title of a *bona fide* purchaser for value, without notice of fraud, though he purchase from a person with notice. *Smith v. Vreeland,* 198
 2. A purchaser with actual or constructive notice of fraud, though he pay a valuable consideration, takes title subject to all the equities to which it was liable in the hands of the vendor. In such case he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to them. *Ib.*
 3. A purchaser is presumed to have knowledge of all the facts disclosed by the deeds under which he claims title. 199
 4. A purchaser cannot claim to be a *bona fide* purchaser without notice, where the facts patent upon the face of his title and under his immediate observation, are sufficient to put him upon inquiry. *Ib.*
 5. Where a party has proceeded to a sale under his execution at law, and become himself the purchaser of the property for a very inadequate consideration, the court will not set aside the prior conveyances, and perfect the title under the execution, to the prejudice of other judgment creditors. All that the complainant can ask in equity is the payment of his debt. If his legal rights are more extensive, they must be enforced at law. *Ib.*
 6. A court of equity, in the exercise of its discretion, will not compel a purchaser to accept a title depending upon an illegal and invalid sale, while it remains open to review, although the judgment unreversed might be conclusive upon the party's rights. *Young's adm'r v. Rathbone,* 225
 7. Where the covenantee, in a contract for the conveyance of land, permits a purchaser to acquire ti-
- tle, take possession of the premises, and pay the purchase money without an intimation of his claim under the covenant, or of his willingness to accept the title, he has no claim to relief in equity. *Van Doren v. Robinson,* 257
8. The title of a purchaser under a sheriff's sale, is co-extensive with the description contained in the mortgage, the bill to foreclose, and the writ of *fieri facias* under which the sale was made. *McGee v. Smith,* 462
9. It is not necessary that the decree should describe the premises precisely; it is usual to designate them in the decree by reference to the bill. *Ib.*
10. A party to a foreclosure suit is bound by the decree, and cannot contest the title of the purchaser under it, while the decree and the sale and conveyance remain in force. *Ib.*
11. Where a defendant has filed an answer to a bill to foreclose, a purchaser at a sheriff's sale under the decree, is presumed to have purchased upon the faith of that answer, and in reliance upon the truth of its statements. Such defendant is estopped from denying the truth of the answer, to the prejudice of the purchaser's title. 463

See AGREEMENT, 6, 12.
SALE OF LAND, 8.

RENT.

See JURISDICTION, 5.
PLEADING, 36.

REVIVOR.

See PRACTICE, 5, 9.

SALE OF LAND.

1. A sale by auditors in attachment of several tracts of land, that might conveniently and reasonably have been sold separately, and where a sale of part would have been sufficient to satisfy the debts of the plaintiff and the applying

- creditors, is a clear breach of trust, and will be set aside as void. *Johnson v. Garrett*, 31
2. A *bona fide* purchaser of land, subject to the lien of an attachment, is entitled to relief against an illegal or inequitable sale by the auditors. *Ib.*
 3. Where a judicial sale is set aside on the ground of gross negligence or abuse of trust, the officer making such sale, as well as the purchaser acting in collusion with him, will be condemned in costs. But where there is no charge of actual fraud or collusion, neither the officer nor purchaser will be condemned in costs. *Ib.*
- Land owned by two tenants in common was ordered to be sold by commissioners appointed to make partition thereof. At the first sale the land was struck off to one of the tenants in common, who refused to accept the deed or pay the purchase money. The premises were thereupon again exposed to sale, and struck off for a less sum. By the terms of the first sale, if the purchaser refused to comply with the conditions, the property was to be resold, and the purchaser held liable for the loss. The deficiency on the second sale was \$1200. On the distribution of the proceeds of sale, the co-tenant claimed, as against the purchaser at the first sale, an allowance for the loss sustained by reason of his non-compliance with the conditions. The claim being disputed, and an order of distribution having been made, the commissioners refused to pay over the money in compliance with the terms of the order, and filed a bill of interpleader, asking to have the right determined. There was some dispute as to the terms of the order for distribution. *Held*—
4. The only legal evidence of the terms of the order of the court, is the *record* or a *duly certified copy* thereof. Evidence of what passed at the time of making it, or of the precise terms of the order itself as directed by the court, is incompetent.
 5. The deficiency incurred by a resale of the property, can only be recovered by an action brought by the commissioners, and when recovered, be distributed by order of the court, as part of the money arising from the sale of the land.
 6. The deficiency can constitute no legal set-off against the claims of the defaulting co-tenant for his share of the proceeds of the sale under the order for distribution.
 7. The case furnishes no ground for a bill of interpleader by the commissioners. *Michener v. Lloyd*, 38
 8. If the sale is by the acre, and the statement of the number of acres is of the essence of the contract, the purchaser, in case of a deficiency, is entitled in equity to a corresponding deduction from the price. *Weart v. Rose*, 290
 9. Where the difference between the actual and estimated quantity of acres of land sold in the gross, is so great as to warrant the conclusion that the parties would not have contracted had the truth been known, in such case the party injured is entitled to relief in equity on the ground of *gross mistake*. *Ib.*
- SET OFF.
- See SALE OF LAND*, 6.
- SHERIFF'S SALE.
1. Whether the execution commands the sheriff to sell *so much* of the premises as may be necessary to satisfy the decree, or to raise the *sum required* out of the premises, the duty imposed upon him, as to the quantity of land to be sold, is the same. His duty, in either event, is to sell only *so much* of the premises as may be necessary to satisfy the requirements of the execution, provided such portion can be conveniently and reasonably detached from the residue of the property. *Vanduyn v. Vanduyn*, 93
 2. A mere error of judgment, or mistaken exercise of discretion, by the sheriff, in the absence of fraud or unfairness in the sale, affords no ground for the interference of the court. *Ib.*
 3. A judicial sale will not be inter-

- ferred with, when the party seeking relief has been guilty of *laches* in the pursuit of his remedy. *Ib.*
4. Motion denied without costs, the applicant acting in behalf of minors. *Ib.*
5. Gross inadequacy of price in the absence of fraud, mistake, illegality, or surprise, is not sufficient to set aside a sheriff's sale and conveyance under an execution at law. *Smith v. Duncan,* 240
6. A court of equity will not afford relief where the complainant has been guilty of *gross laches*, or where the injury was caused by his own *inexcusable negligence and inattention* to his interests. *Ib.*
7. A sheriff's sale and conveyance will not be set aside where the property has been resold to a third party for a valuable consideration, without notice of the complainant's equity. Where the equities are equal, the court will not interfere with the party holding the legal title, either for discovery or relief. *Ib.*
8. The legal title to land is not affected by a sheriff's deed, where, at the time of the levy and sale, the title was not in the defendant in execution. *Belford v. Crane,* 265
9. The well settled doctrine of the court of equity is, that *mere inadequacy of price* affords no ground of relief, either against a private contract or a judicial sale. *Cummins v. Little,* 48
10. But inadequacy of price may be so gross and unconscionable as to shock the conscience, and, in the case of a private contract, to amount to conclusive and decisive evidence of fraud; or, in the case of a judicial sale, to *constructive fraud* and abuse of trust. *Ib.*
11. That is a public and a proper place for setting up advertisements, contemplated by the act regulating sales of real estate, which is likely to give information to those interested, and who may probably become bidders at the sale. *Ib.*
12. The sheriff is bound to conduct the sale so as to protect the rights and promote the interests of all parties in interest, and to this end to secure, as far as practicable, the most general diffusion of the notice of sale. *Ib.*
13. The true test of a proper exercise of discretion by the sheriff in setting up notices is, whether he has set them up as a discreet man, desirous of effecting a sale of his property to the greatest advantage, would have done. *Ib.*
14. If a sheriff abuses, to the detriment of subsequent encumbrancers or of the defendant in execution, the discretion vested in him by law to make sale under execution, a court of equity will grant relief, although there has been a formal compliance in the conduct of the sale with all the requirements of the statute. 49
15. It is not necessary that there should be *actual* fraud, committed or meditated. The abuse of discretion in the execution of the trust is a *constructive* fraud, against which equity will relieve. *Ib.*
16. Where a sale by a public officer is conducted in violation of the spirit and policy of the law, and so as in fact to defeat the just claims of encumbrancers, or greatly to prejudice the rights of the defendant in execution, the sale will be set aside, though the formal requirements of the statute have been complied with. *Ib.*

SPECIFIC PERFORMANCE.

1. The enforcement of the specific performance of a contract is an exercise of the extraordinary jurisdiction of the court, resting in *sound discretion*. *Gariss v. Gariss,* 79
2. Specific performance will not be decreed, where the party seeking it has been guilty of *laches*, or negligent in his application. *Ib.*
3. Where a contract is certain and fair in all its parts, and for an adequate consideration, and the party seeking its enforcement has held himself ready to perform it according to its terms, without default on his part, and has been prompt in his application for relief, a court of equity will decree a specific performance of the contract, as a matter of course. *Hopper v. Hopper,* 147

4. It constitutes no objection to a decree for specific performance, that the application is made to enforce the payment of the purchase money, and not to compel a delivery of the title. *Ib.*
5. The doctrine is well established that the remedy is mutual, and that the vendor may maintain his bill in all cases where the purchaser could sue for specific performance of the agreement. *Ib.*
6. Mere pecuniary inability to fulfil an engagement does not discharge the obligation of the contract, nor does it constitute any defence to a decree for specific performance. *Ib.*
7. Where the contract is not capable of being performed by reason of some difficulty inherent in the subject matter of the contract, a specific performance will not be decreed. *Ib.*
8. Specific performance is relief which equity will not give unless in cases where the parties seeking it, come as promptly as the nature of the case will permit. *Van Doren v. Robinson,* 257
9. A party, who seeks the specific performance of a contract, must show that he has performed, or been ready and willing to perform, all the essential terms of the contract. *Thorp v. Petit,* 488
10. The answer of the defendant being directly responsive to the allegations of the bill, and a full denial of its equity, injunction dissolved. *Ib.*

See AGREEMENT, 4 to 10.

STATUTES.

It is an established rule in the exposition of statutes, that the intention of the legislature is to be derived from a view of the whole, and of every part of the statute taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. When words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is

to be taken or presumed, according to what is consonant to reason and good discretion. *Morris Canal and Banking Co. v. Central Railroad Co.,* 419

SURPRISE.

*See EVIDENCE, 16.
SHERIFF'S SALE, 5.*

TAX.

By the act of 1854. *N.J. Dig.* 851, § 64, when the mortgagee resides in a different township from that in which the mortgaged premises lie, the tax on the money secured by the mortgage is to be assessed against and paid by the mortgagor in the township where the lands lie, and the receipt of the collector therefor is made a legal payment for so much of the interest of the mortgage, and is to be allowed and deducted therefrom by the mortgagee. *Held—*

1. The payment of the tax and the receipt of the collector is a legal payment of so much *interest*, not of principal; a payment of the *accrued* and *accruing* interest, not of interest to grow due at some future time.
2. When a mortgagor, entitled to have the tax assessed against and paid by him deducted from the interest, has paid the interest in full as it became due, without deducting the tax, he cannot afterwards claim any deduction therefor from the arrears of interest. *Keeney v. Atwood,* 35
3. The power to sell land for the payment of taxes, is a naked power, not coupled with an interest, and must be exercised in strict accordance with the provisions of the statute. Every prerequisite to the exercise of the power must precede it. *Hopper v. Malleson's execs,* 382
4. To establish a title under a sale for taxes, it is incumbent on the purchaser to show that all the prerequisites to the exercise of the power of sale have been complied with. The deed is not even *prima facie* evidence of that fact. *Ib.*

5. It is essential to the validity of a sale of land, under the "act to make taxes a lien on real estate in the county of Passaic, and to authorize the sale of the same for the payment thereof," (*Pamph. L.*, 1852, p. 247.) that it should appear that the tax was assessed on account of the property sold. *Ib.*
6. The recital of the tax warrant, "whereas it appears to the mayor and aldermen of the city of Paterson, that an assessment of four dollars and fifty cents of taxes, &c.," is not legal evidence of the fact of an assessment, nor of demand of payment. *Ib.*
7. The assessment *itself* is the only competent and legal evidence of the fact of an assessment. *Ib.*
8. Where the tax warrant directs a sale to be made to raise a sum larger than the whole amount due, it is a clear excess of authority, and renders the warrant, so far as it affects the land in question, null and void. *Ib.*
9. Even if all the requirements of the statute had been strictly complied with, so as to confer upon the purchaser at such sale a valid title against the heirs of the former owner, and all claiming under them, a prior mortgage given by their ancestor would not thereby have been extinguished. 383
10. The phrase *owner or owners* (*Nic. Dig.*, 853, § 77, and *Pamph. L.*, 1852, p. 249., § 7,) was used to denote the *owner of an estate in possession at the time of the assessment*, and not a prior owner, or the owner of an estate in expectancy, or of any executory or contingent interest, and the design of the act was to make the interest of such owner only, and those claiming under him, liable for the tax assessed. *Ib.*
11. The right of a mortgagee is not defeated by a tax sale, where the mortgage was not given by those who were owners of the land at the time of the assessment, or against whom the tax was assessed, but is a title paramount to theirs. Such mortgage is a valid and subsisting encumbrance upon the land in the hands of the purchaser at the sale. *Ib.*

TENANT FOR LIFE.

A tenant for life is entitled to work a mine, quarry, clay-pit or sand-pit, which has been opened and used by the former owner. It is a mode of enjoyment of the land to which he is entitled. *Reed's ex'r v. Reed,* 248

TRUST AND TRUSTEE.

1. Where real estate is *in fact* paid for with the funds of a company, there is clearly a *resulting trust* in favor of the company, although the deed therefor is made absolute to a third party, and purports upon its face to be for his own use and benefit. *Stratton v. Dialogue,* 70
2. A party so taking the title, becomes a *trustee* for the creditors and stockholders, and the trust will be enforced for their benefit at the instance of the receiver. *Ib.*
3. Where a mortgage is given to secure a trust fund belonging to the mortgagor, as between himself and the holder of a second mortgage given by him, he can have no claim in equity to the fund, until the second mortgage is satisfied. *Tappan's ex'r v. Ricamio,* 89
4. It is within the power of a court of equity to protect the interests of legatees in remainder, during the life of the tenant for life; and the power will be exercised, not only in behalf of the legatee, but also of his assignee, or of any other person legally entitled to the fund, upon the determination of the estate for life. *Ib.*
5. If a trust fund is in danger of being diverted to the injury of any claimant having a present or future fixed title thereto, the administration of the fund will be duly secured by the court, in such manner as the court may in its discretion, under all the circumstances, deem best fitted to the end. *Ib.*
6. Upon the death of one of several co-trustees, the *office* of trustee will devolve with the estate upon the survivor, and ultimately upon the heir or personal representatives of the last survivor. Trusts of real estate, upon the death of the trustee, devolve upon his heir-at-law;

- trusts of personality vest in his executor or administrator. *Schenck v. Schenck's execs.* 174
7. If a trustee, by his own negligence, suffers his co-trustee to receive and waste the trust fund, when he has the means of preventing such receipt by the exercise of reasonable care and diligence, he will be held responsible for the loss. 175
8. Where the duty of a trustee is a matter of doubt, it is his undoubted right to ask and receive the aid and direction of a court of equity in the execution of his trust. *Kearney v. Macomb.* 189
9. A change in the ecclesiastical relation of a church for whose benefit property is held in trust, does not necessarily involve any perversion of the trust, or diversion of the fund from its legitimate purpose. *Swedesborough Church v. Shiver.* 453

See DEED, 3.

EXECUTORS AND ADMINISTRATORS, 1 to 6.

FRAUD, 1, 3.

HUSBAND AND WIFE, 1, 6, 7.

USURY.

1. It is no valid objection to a defense of usury, that the mortgage sought to be foreclosed was given for a part of the *purchase money* upon a contract for the sale of land, and not for a *technical loan of money*. *Diercks v. Kennedy,* 210
2. The taking of illegal interest, either upon a lending of money, or upon the forbearance of a debt, constitutes usury. *Ib.*
3. If an agent, in making a loan of money, accept from the borrower a bonus beyond the legal rate of interest, such act of the agent will not render the contract usurious, if the bonus was taken without the knowledge of the principal, and was not received by him. *Muir v. Newark Savings Institution,* 537
4. The reservation of interest for money actually on hand and subject to the call of the borrower, during the time he is engaged in

completing his securities, is not usurious. *Ib.*

5. The essence of the offence of usury is a corrupt agreement to contravene the law. Any contrivance to evade the statute, and to enable the lender to receive more than legal interest for his money, renders the contract a corrupt one. And the law will infer the corrupt agreement, when it appears by the face of the papers or otherwise, that illegal interest was intentionally reserved, although the illegality arose from a mistaken construction of the law. *Ib.*

VENDEE.

See AGREEMENT, 6.

VOLUNTARY CONVEYANCE.

See FRAUD, 5.

HUSBAND AND WIFE, 2, 4, 5.

MARRIED WOMEN, 10.

WILL.

1. Where a testator, by his will, provides that his minor children shall receive their maintenance upon his homestead farm, so long as the devisees and their mother agree to continue upon it and support them there, if the children, without the consent of their mother and the devisees, leave the farm during the period for which the testator provided for their maintenance there, they can claim it in no other form; but otherwise, if they leave by constraint, and not from choice. *Jordan v. Clark.* 243
2. Where an adequate motive for the destruction of a will is assigned by the party seeking to establish it, and clearly confirmed by the evidence, the court will not, upon mere conjecture, impute an inadequate and dishonest motive. *Wyckoff v. Wyckoff,* 401
3. The true rule is, that the will may be established upon *satisfactory* proof of its destruction, and of its contents or substance. Whether the proof be by one witness, or

- by many, it must be clear, satisfactory, and convincing. *Ib.*
4. The cost of establishing the will, and of taking out letters of administration, ordered to be paid out of the estate, the burden falling upon the residuary legatee, by whose act the costs were occasioned. *Ib.*
- Isaac Rowe, by his last will and testament, gave as follows: "I give and devise unto Sarah White the sum of \$5000, to be paid unto the said Sarah White; and if the said Sarah White die without an heir or heirs, the said sum of \$5000 is to go to Leonard Crum, the son of Henry Crum." *Held—*
5. The first legatee takes a present vested interest in the fund, liable to be divested upon the contingency of her dying without issue. The limitation over, being upon a definite failure of issue, is good by way of executory bequest. *Rowe's ex'rs v. White,* 411
6. A direction by a testator "that all the rest and residue of his estate of what kind soever there might be at the time of his death," should be converted into money by his executors, &c., extends to and includes such real estate as he may have acquired after the making of the will, and such land is subject to the power of sale conferred upon the executors. *Fluke v. Fluke's ex'rs,* 478
7. Until the sale be made, the legal title descends to and vests in the heirs-at-law of the testator, as tenants in common. *Ib.*
8. The heir-at-law takes the legal title charged with the trusts created by the will. Equity will not interfere with the execution of the trusts by the executors. It regards as actually performed, that which is directed to be done. 479
9. Lands directed by the testator to be sold and converted into money, and the proceeds distributed either among the heirs or other legatees, is regarded as a gift of money. *Ib.*
10. Where the whole beneficial interest in the land directed to be converted into money, belongs to the person or persons for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the land, if he elect to do so before the conversion has actually been made. But where there are several *cestui que trusts* taking different interests under the will from what they would do as heirs-at-law, there is no case for the application of the doctrine of election, and the executor must perform the trust created by the will. *Ib.*

*See EXECUTORS & ADMINISTRATORS, 5.
LEGACY.*









